Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1542

MARILYN W. ANDRULIS

and

ANDRULIS RESEARCH CORPORATION,
Petitioners,

v.

UNITED STATES *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Dated: April 2, 1980

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Marilyn W. Andrulis and Andrulis Research Corporation respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia in this case.[1]

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[1] Respondents are the United States, the United States Small Business Administration, and A. Vernon Weaver, in his official capacity as Administrator of the United States Small Business Administration.

OPINIONS BELOW

The opinion of the court of appeals (App. A, pp. 1a-37a, *infra*) is reported at 609 F.2d 514. The opinion and orders of the District Court (App. B, pp. 38a-40a, *infra*) are not reported.

JURISDICTION

The judgment of the court of appeals (App. C, pp. 41a-42a, *infra*) was entered on September 26, 1979. A timely petition for rehearing was denied on January 4, 1980 (App. D, p. 43a, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

(1) Whether, under The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, which provides that a court may award "a reasonable attorney's fees as part of the costs" to a "prevailing party" in "any action or proceeding" involving specified civil rights statutes, a court is barred by sovereign immunity from granting a fee award to a party prevailing against the United States.

(2) Whether § 5(b) of the Small Business Act of 1953, 15 U.S.C. § 634(b), which provides that the United States Small Business Administration may "sue and be sued" in any court, waives any defense of sovereign immunity which could prevent the assessment of attorney's fees against that agency under 42 U.S.C. § 1988.

STATUTES INVOLVED

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976), provides in relevant part:

> "§ 1988. *Proceedings in vindication of civil rights* * * *. In any action or proceeding to enforce a provision of sections [1981, 1982, 1983, 1985, and 1986 of this title], title IX of Public Law 92-318 [20 U.S.C. § 1681 *et seq.*], or in any civil action or proceedings, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d *et seq.*], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

28 U.S.C. § 2412 (1976) provides as follows:

> "Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action * * *."

The Small Business Act of 1953, 15 U.S.C. § 634(b) (1976), provides in relevant part:

> "[T]he Administrator may—
>
> (1) sue and be sued in any court of record of a State having general jurisdiction, or in any United States district court, and jurisdiction is conferred upon such district court to determine such controversies without regard to the amount in controversy; but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Administrator or his property; * * *."

Section 702 of the Administrative Procedure Act, 5 U.S.C. § 702 (1976), provides in relevant part:

> "* * * An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party * * *."

STATEMENT OF THE CASE

A. *Background.* This case arises from an action alleging, *inter alia*, that the United States Small Business Administration, by summarily terminating petitioners from participation in its Section 8(a) program, 15 U.S.C. § 637(a) (1976), violated 42 U.S.C. §§ 1981, 1985(c) and 2000d, by discriminating against petitioner Dr. Marilyn W. Andrulis on grounds of race and sex. The district court's jurisdiction rested on 28 U.S.C. §§ 1331(a), 1343, 1361, 2201; 5 U.S.C. § 702; and 15 U.S.C. § 634(b).[2]

Dr. Andrulis is the president and majority stockholder of petitioner Andrulis Research Corporation ("ARC"), a research and development firm that Dr. Andrulis formed in 1971 and that is involved in multi-disciplinary contract research. Prior to 1971, Dr. Andrulis had been employed as a scientist by several companies. She began her own business in order to overcome impediments to her professional advancement due to discrimination on the basis of sex. Even after beginning ARC, however, and despite substantial research advances by that firm, Dr. Andrulis experienced similar discrimination on the part of federal government contracting officials. J.A. 61-62, 66-67.[3]

Because of this difficulty, Dr. Andrulis applied on April 22, 1977 to the Small Business Administration's ("SBA") § 8(a) program, 15 U.S.C. § 637(a) (1976). Section 8(a), at that time, empowered SBA to arrange for small business

[2] The only relevant factual presentation explaining the background to this action was an affidavit of petitioner Marilyn W. Andrulis accompanying a motion for a temporary restraining order, or, in the alternative, for a preliminary injunction. The Government never introduced evidence to rebut specifically the contentions made therein, and it relied heavily upon this affidavit in its statement of the case to the court of appeals. Gov't Br., *Andrulis* v. *United States*, No. 78-2039 (D.C. Cir.) at 4-6.

[3] "J.A." refers to the Joint Appendix filed below in the court of appeals.

nesses to acquire federal government contracts without competitive bidding.[4] By regulation, admission to the program was limited to firms "controlled by * * * persons who have been deprived of the opportunity to develop and maintain a competitive position in the economy because of social or economic disadvantage." 13 C.F.R. § 124.8(1)(c) (1977). SBA also provided that "social or economic disadvantage" could be demonstrated by a showing of, *inter alia*, "[p]revious failures to compete effectively for government contracts * * *." J.A. 72. The SBA approved ARC for the program, noting specifically that Dr. Andrulis had "experienced an inordinate degree of resistance from various government programs and procurement activities," and that she was "socially and/or economically disadvantaged." J.A. 74.

Under the auspices of the § 8(a) program, ARC entered serious negotiations with the Department of the Navy for the testing of a new anti-submarine target detection system which Dr. Andrulis had devised. J.A. 76. When these negotiations were almost completed in September, 1977, however, Dr. Andrulis heard rumors that she had been terminated from the program. She had received no prior indication that ARC's program participation was in jeopardy, but, after making inquiries with SBA officials, she was, in fact, informed that ARC was no longer a § 8(a) participant. This dismissal and the consequent loss of the pending government contract brought ARC to the brink of bankruptcy. J.A. 69, 77-79, 88-89. Dr. Andrulis then persuaded SBA to grant her a hearing, but her reconsideration request was denied without explanation. SBA refused to issue to Dr. Andrulis its findings supporting the denial. J.A. 86. When, through Freedom of Information Act requests and

[4] Congress amended the statute authorizing this program in 1978. P.L. 95-507, 92 Stat. 1757. The amendments, by and large, do not dramatically alter the scope of the § 8(a) program, but do incorporate into legislation various formal and informal SBA policies relating to its administration.

Congressional assistance, Dr. Andrulis later obtained these findings, she learned that ARC's termination was based on her race and sex. J.A. 86.[5]

On November 11, 1977, Dr. Andrulis (and ARC) filed a complaint charging SBA with discrimination in the operation of its § 8(a) program and alleging violations, *inter alia*, of 42 U.S.C. §§ 1981 and 1985(c) as well as of Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d, *et seq.*). Petitioners sought damages and declaratory and injunctive relief, and requested attorney's fees pursuant to 42 U.S.C. § 1988. The District Court rejected SBA's claim that its actions were protected by sovereign immunity and entered a temporary restraining order reinstating ARC in the § 8(a) program. Tr. Nov. 11, 1977.[6] The government later stipulated to a preliminary injunction. J.A. 101. On March 8, 1978, two days before the SBA was required to answer discovery requests aimed at proving that its actions were motivated by race and sex discrimination, it entered into a settlement agreement permanently reinstating ARC in the program and conceding that the initial § 8(a) entry decision pertaining to ARC was correct. J.A. 106-111. Petitioners subsequently received the Navy contract earlier negotiated.

B. *The Opinion Below.* On June 12, 1978, the district court, finding that petitioners had prevailed in the action, granted their request for attorney's fees under § 1988.

[5] SBA's discriminatory intent is evidenced by an SBA memorandum stating as the first reason for her disqualification her non-minority status. J.A. 80. This explanation was repeated in the findings adopted after her appeals hearing and in other SBA documents. J.A. 86. Informally, she was told by SBA officials and others that ARC's admission to the program had set an unintended and unwanted precedent which would have, if unchecked, allowed additional non-minority women into the § 8(a) program. J.A. 81, 85-86.

[6] "Tr." refers to the November 11, 1977 transcript of the hearing on the motion for a temporary restraining order in the district court.

App. B, pp. 38a-39a, *infra*. Section 1988 provides that a district court may award reasonable attorney's fees as part of the costs to the prevailing party in "any action" alleging the violation of certain civil rights statutes, including §§ 1981, 1985, and Title VI. SBA appealed the award, claiming that it was barred by sovereign immunity and by the fact that petitioners could not be deemed prevailing parties, because they had not proven discrimination. Shortly before oral argument in the court of appeals, SBA, in a letter to the clerk of the court, abandoned its argument that petitioners had not prevailed in this action. Justice Department Letter to George L. Fisher (April 11, 1979).

In a 2-1 decision, the court of appeals reversed the district court's order.[7] The majority rested its decision heavily upon 28 U.S.C. § 2412, which provides that, although "costs" may be assessed against the United States, attorney's fees shall not be so awarded "[e]xcept as otherwise specifically provided by statute * * *." It found that, even though § 1988 authorizes payment of attorney's fees "as part of the costs" in "any" action under the civil rights laws referenced therein, § 1988 does not meet the terms of § 2412 because it does not expressly mention the United States by name.

In so finding, the majority acknowledged (App. 7a, 9a) that, in rejecting the argument that § 1988 did not contain the requisite "express statutory language" waiving Eleventh Amendment immunity for the States, this Court held in *Hutto* v. *Finney*, 437 U.S. 678, 694 (1978), that the term "any action" within § 1988 "could not be broader." The majority nevertheless rejected petitioners' contention that § 1988 was, *a fortiori*, broad enough to include actions against the United States. It distin-

[7] On appeal, petitioner's case was consolidated for purposes of argument with *NAACP* v. *Civiletti*, an action raising the identical § 1988 issue. Both cases were disposed of in the same opinion.

guished *Hutto* on the ground that under § 1988 fees are to be paid as "costs," and that, while federal courts had awarded "costs" against States for about fifty years prior to § 1988's passage, *Fairmont Creamery* v. *Minnesota*, 275 U.S. 70 (1927), costs had only been regularly assessed against the United States since 1966. Hence, the majority assumed that, when Congress passed § 1988 in 1976, it clearly had the States in mind, but it never envisioned that § 1988 "costs" would apply to the federal government. App. 9a-10a.[8]

While conceding that the legislative history of § 1988 did provide a basis for concluding that the United States was covered by the statute,[9] the majority found no "unequivocal indication" that Congress intended that result. App. 10a. It thus concluded that, under these circumstances, the only attorney's fee provision which could be deemed a waiver of sovereign immunity is one which mentioned the United States by name. App. 9a.[10]

The majority, even though it recognized that the Small Business Act's "sue and be sued" clause, 15 U.S.C. § 634

[8] The majority also relied upon a two-page *per curiam* opinion by the Third Circuit concluding that § 1988 did not cover the United States. *Shannon* v. *HUD*, 577 F.2d 854 (3d Cir.), *cert. denied*, 439 U.S. 1002 (1978). As the dissent noted (App. 32a, n.22), *Shannon* was decided before this Court's decision in *Hutto*. *Shannon* also did not address the "sue and be sued" argument presented in this litigation. *See* pp. 15-17, *infra*.

[9] The court of appeals acknowledged, for example, that the ranking minority member of the House Judiciary Committee, which reported out § 1988, stated on the floor of the House that the United States would be a fee-paying party under § 1988, App. 10a, n.11, and that the § 1988 House Report specifically referred to *Hills* v. *Gautreaux*, 425 U.S. 284 (1976), a Title VI action against a federal cabinet officer, as an example of the kind of case to which § 1988 would apply. App. 11a-12a.

[10] The majority in this regard relied upon Titles II and VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000b-1, 2000e-5(k), specifically delineating the United States as a fee-paying party.

(b), constitutes an "express statutory consent" to suit, also rejected petitioner's claims that that clause, *inter alia*, would permit an award of fees to a party prevailing against the SBA under § 1988 even if § 1988 itself does not waive sovereign immunity. App. 12a, n.12.

In his dissent, Chief Judge Wright found that this Court's determination in *Hutto* that the term "any" action within § 1988 "could not be any broader," coupled with the many express references in the legislative history to the federal government's liability under § 1988,[11] made it clear that the United States was subject to § 1988. App. 19a-32a.[11a] The dissent also demonstrated

[11] Besides relying upon the statements of the ranking House minority member (App. 29a-32a) and the reference in the House Report to *Hills* v. *Gautreaux* (App. 23a-24a), *see* n.10, *supra*, Chief Judge Wright noted that the principal draftsmen of the legislation, Congressman Drinan and the Justice Department representative testifying on the bill, both expressly recognized that the United States would be covered by the legislation, as did Senator Allen, when he tried to amend the legislation so as to reduce the liability of the United States. App. 24a-26a, 28a & n.16.

Chief Judge Wright also highlighted several passages in the committee reports, as well as the legislative debates, which made it clear that § 1988 was intended to be identical to existing civil rights attorney's fee provisions, all of which provided for fees against the United States. App. 22a-24a, 27a. *See* n.11, *supra*.

Finally, Judge Wright disposed of each of the several "inferential" legislative history arguments advanced by the government in their brief below, only one of which was relied upon by the majority. App. 27a-32a and nn. 20-21.

[11a] The dissent (App. 19a-20a, n.10) also addressed the majority's reliance upon the IRS provision within § 1988, which was added to the legislation on the Senate floor. The majority argued that, since that provision states that fees may be awarded against the United States in IRS enforcement actions, it shows that Congress knew how to cover the United States in a fee context when it wanted to. Judge Wright correctly pointed out, however, that the IRS and civil rights aspects of § 1988 were motivated by different Congressional interests. In the civil rights context the words "any action" were used because "Congress firmly intend[ed] that all our civil rights laws be vigorously enforced," 122 Cong. Rec. S16252 (daily ed. Sept. 21, 1976) (remarks of Sen. Kennedy). For pur-

that Congress frequently drafts statutes which make the federal government liable for fees without express mention of the United States. App. 19a-22a.[12] Because the dissent found that federal sovereign immunity was waived by § 1988, it saw no reason to address, *inter alia*, the "sue and be sued" argument advanced by petitioners. App. 14a, n.2.

REASONS FOR GRANTING THE WRIT

A. *Section 1988.* If left unaltered, the court of appeals' ruling that the United States need not pay fees under § 1988 will doubtless have a substantial impact upon the private enforcement of several important civil rights statutes against the federal government.[13] As both

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poses of the tax provision, Congress, as evidenced by the remarks of the draftsman of that proposal, Senator Allen, *only* wanted fees paid when taxpayers were sued by the government, not when taxpayers sued the government. Thus, not all IRS actions were covered, but only enforcement actions. The dissent therefore concluded that the specific reference to the United States was required to show the limited reach of the IRS provision and was merely intended to make clear that § 1988 does not apply to "any tax action." The dissent further concluded that no negative inference could be drawn from this provision.

[12] Chief Judge Wright noted, for example, that for the purposes of the Clean Air Act, 42 U.S.C. § 7604, the term "any party" without more has been deemed sufficiently explicit to apply an attorney's fee provision to the United States. *NRDC* v. *EPA*, 168 U.S.App.D.C. 111, 512 F.2d 1351, 1353-54 (1975) (*dictum*); *NRDC* v. *EPA*, 484 F.2d 1331, 1336, n.5 (1st Cir. 1973). *See also Sierra Club* v. *EPA*, D.C. Cir. No. 76-1037 (April 27, 1979) (Federal government did not contest award when statute merely provided "in any judicial proceeding"). App. 20a-21a. Chief Judge Wright also pointed out that, when Congress passed the 1978 Rehabilitation Act Amendments, it included an attorney's fee provision, § 505(b), which was acknowledged by the draftsmen to be modeled after § 1988. The Committee reports accompanying § 505(b) and its draftsmen both made clear that § 505(b) covered the United States. App. 21a-22a.

[13] The statutes covered by § 1988 are 42 U.S.C. §§ 1981, 1983, 1985, 1986, Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681), and Title VI of the Civil Rights Act of 1964 (42

the majority (App. 13a, n.13) and the dissent (App. 16a-19a) recognized, Congress enacted § 1988 because it firmly believed that, without provision for the payment of attorney's fees, the civil rights statutes referenced therein would not be properly enforced. Thus, the Senate Report stated that, since citizens suing under the civil rights laws often "have little or no money with which

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U.S.C. § 2000d). Four of these provisions, §§ 1981, 1985, and Titles VI and XI, have applicability to the United States.

Section 1981 provides that "[a]ll persons * * * shall have the same right in every State and Territory to make and enforce contracts * * * as is enjoyed by white citizens." It is applicable to discrimination against federal officials. *Bowers* v. *Campbell*, 505 F.2d 1155 (9th Cir. 197); *Baker* v. *F&F Investment Co.*, 489 F.2d 829 (7th Cir. 1973); *NAACP* v. *Levi*, 418 F. Supp. 1109, 1117 (D.D.C. 1976).

Section 1985(c) provides a remedy against "two or more persons" who conspire to deprive "any person or class of persons" of "the equal protection of the laws, or of equal privileges and immunities under the laws," and has been applied to federal officials. See, *e.g.*, *Dry Creek Lodge, Inc.* v. *United States*, 515 F.2d 926, 931 (10th Cir. 1975).

Title VI provides:

> "No person * * * shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

Title IX provides:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681.

For cases pertaining to the Federal government's obligation under Titles VI and IX, see, *e.g.*, *Hills* v. *Gautreaux*, 425 U.S. 284 (1976); *Adams* v. *Richardson*, 156 U.S.App.D.C. 267, 480 F.2d 1159 (1973) (en banc); *Gautreaux* v. *Romney*, 448 F.2d 731 (7th Cir. 1971); *Women's Equity Action League* v. *Califano*, C.A. No. 74-1746 (D.D.C., December 29, 1977) (consent decree); *NAACP Western Region* v. *Brennan*, 360 F.Supp. 1006 (D.D.C. 1973); *Perry* v. *Golub*, 400 F.Supp. 409 (N.D. Ala. 1975).

to hire a lawyer," it is crucial, if they

> "are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, [that plaintiffs] have the opportunity to recover what it costs them to vindicate these rights in court." S. Rep. No. 94-1011, 94th Cong., 2d Sess. 2 (1976).

The Report then boldly stated, in the words of Mr. Justice Tom Clark: "Not to award counsel fees in cases such as this *would be tantamount to repealing the Act itself* by frustrating its basic purpose. * * * Without counsel fees the grant of Federal jurisdiction is but an *empty gesture* * * * *Hall* v. *Cole*, 412 U.S. 1 (1973), quoting 462 F.2d 777, 780-81 (2d Cir. 1972)." *Id.* at 3 (emphasis added). Even the majority, also relying upon the above-quoted passage, was forced to conclude: "Given the importance of attorney's fees in ensuring enforcement of our civil rights laws, a strong policy argument can be made that [§ 1988] should permit the recovery of attorney's fees against the federal government." App. 13a.

Neither the government nor the majority disputes the fact that when Congress enacted § 1988, it "firmly intend[ed] that all our civil rights laws be vigorously enforced." 122 Cong. Rec. S 16252 (daily ed. Sept. 21, 1976) (Remarks of Sen. Kennedy). They would also concede that, by using the phrase "any action," Congress intended § 1988 to cover civil rights actions against private parties and State and local governments. Yet, somehow the government and the majority conclude that, when it came to enforcing the § 1988 civil rights statutes against the federal government, Congress had a completely different intent. Despite its use of the broad and all encompassing term "any action," the government and majority argue that Congress meant to carve out a special exception for private enforcement of these civil rights actions against the United States—an exception

which would make these statutes as applied to the federal government the very "empty gesture" Congress feared and which would signal to federal agencies and officials that in this area of the law they need not fear "to proceed with impunity." [14]

If Congress had intended this dramatic result—which in its view was tantamount to the nullification of important civil rights statutes as they apply to the federal government—it surely would have made its reasoning clear. Yet, neither the government nor the court of appeals has ever cited a shred of direct evidence suggesting that Congress intended to except the federal government, as opposed to all other civil rights defendants, from its obligations under anti-discrimination statutes. Instead of citing direct evidence, both the government and the majority reach their result principally by paying great homage to highly technical and abstract applications of the doctrine of sovereign immunity, *which were in great disfavor in Congress at the time of § 1988's passage.*[15]

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[14] Indeed, the removal of fee incentives for private civil rights enforcement is especially critical in the federal context, because the Justice Department does not prosecute, but only defends, civil rights actions against itself and its fellow agencies. As the dissent correctly noted: "Unlike the cases involving private or state defendants, the complainants [suing the United States] are not merely 'private attorneys general'; they are the *only* attorneys general. * * *" App. 17a-18a. (Emphasis added.) The facts of this case themselves indicate that strict enforcement is necessary.

[15] An amendment to the Administrative Procedure Act, enacted contemporaneously with § 1988, greatly limited the use of the defense of sovereign immunity by the United States. 5 U.S.C. § 702. The House and Senate Reports accompanying the APA amendment make clear the Congressional distaste for the federal government's traditional reliance on that doctrine. See, *e.g.*, S. Rep. No. 94-996, 94th Cong., 2d Sess. (1976) at 3-9. Indeed, it is significant, for purposes of construing § 1988, that § 702 and § 1988 were approved by Congress on the same day, October 1, 1976, and were signed by the President within two days of each other. It would be passing strange if Congress, without expressly so providing, intended to exclude the United States from § 1988, on grounds of sovereign immunity, at the same time it was attempting to severely narrow that defense for purposes of the APA. See *Kokoszka* v. *Belford*, 417 U.S. 642, 650 (1974).

Neither the government nor the majority, however, pays any deference to the liberal construction federal courts have consistently given the civil rights statutes in question—statutes which this Court has often said must be given "a sweep as broad as [their] language." See, *e.g.*, *Griffin* v. *Breckenridge*, 403 U.S. 88, 97 (1971); *Jones* v. *Mayer Co.*, 392 U.S. 409, 437 (1968); *United States* v. *Price*, 383 U.S. 787, 801 (1966).

If the term "'any' action" "could not be broader," *Hutto*, *supra*, 437 U.S. at 694, and if § 1988 must be "given a sweep as broad as its language," there can be no room for doubt that Congress intended that the United States, just like any other non-prevailing defendant in a civil rights action, pay the plaintiffs "reasonable attorney's fees as part of the costs." [16]

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[16] The dissent below also more than adequately demonstrated, *see* n.12, *supra*, that there are several attorney's fees statutes which have been found to apply to the federal government without mentioning the United States by name. The majority sought to rebut this point by arguing that it was otherwise clear from these statutes that the United States would sometimes be a defendant in the actions for which fees would be awarded. App. 5a-6a. The majority failed to acknowledge, however, that it is widely established that the United States may be a defendant under four of the six statutes referenced within § 1988. *See* n.13, *supra*. Indeed, the House Report listed *Hills* v. *Gautreaux*, *supra*, a Title VI action against a Federal official, as the kind of case in which fees would be awarded against a government entity. *See* n.10, *supra*.

Moveover, § 505 of the Copyright Act, 17 U.S.C. § 505 (1976), is also relevant here. That provision governs the award of attorney's fees, stating that "[t]he court in its discretion may allow the recovery of full costs by or against *any party other than the United States or an officer thereof*. The court may also award a reasonable attorney's fee to the prevailing party as part of the costs." (Emphasis supplied). As the legislative history of this statute underscores, the significance of this language is that it *"makes clear* that *neither costs nor attorney's fees* can be awarded to or against 'the United States or any officer thereof.'" [1976] U.S. Code Cong. & Ad. News 5659, 5779. (Emphasis supplied). Were the majority's argument correct, such language would be unnecessary because the reference to "any party" would not by itself even raise the possibility of recovering fees from the United States; moreover, Congress' evident concern with possible liability on the part of the federal government would make no sense.

We respectfully suggest that the serious adverse impact on civil rights enforcement of the court of appeals' decision, as well as the errors in the majority's reasoning pointed out by the dissent, see pp. 9-10 and nn.11-12, *supra*,[17] make the opinion below fully worthy of this Court's review.[18]

B. *"Sue and Be Sued" Clause.* Petitioners also contended below that § 5(b) of the Small Business Act, 15 U.S.C. § 634(b), should have provided them with an independent grounds for recovering fees under § 1988

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[17] We wish only to comment briefly on the majority's reasoning that § 1988 lifts the bar for State, but not federal, sovereign immunity, because, at the time of the passage of § 1988, "costs" had only been awarded against the Federal government for a decade while they had been awarded against the States for almost a half century. *See* pp. 7-8, *supra*. The majority's premise seems to have been that, since the assessment of costs was so "recent," Congress could not have understood when it decided to award "attorney's fees as part of the costs" under § 1988 that it would be permitting awards against the United States. This logic violates this Court's recent admonition that "[i]t is always appropriate to assume that our elected representatives, like other citizens, know the law; . . . ." *Cannon* v. *Univ. of Chicago*, 441 U.S. 677, 696-97 (1979). It also disregards the express recognition by the draftsman of the legislation, Congressman Drinan, that § 1988 was compatible with § 2412, the statute which provides that "costs" may be awarded against the United States. *See* n.11, *supra*. Indeed, by making attorney's fees a part of the costs, Congress was expressly crafting § 1988 so as to satisfy the waiver of sovereign immunity within § 2412.

[18] The Seventh Circuit, on December 12, 1979, entered an order, as yet unreported, which is as of now in conflict with the decision reached below. *Hampton* v. *Hanrahan*, No. 77-1698. The Seventh Circuit, finding that it could not in the circumstances of that case assess fees under § 1988, against, *inter alia*, certain federal defendants sued in an unofficial capacity, ordered, *inter alia*, that the United States pay a part of the fee award. Order at 13 and n.32. Following this order, the United States was permitted to intervene in the action and petition for rehearing. That petition, as well as others, is *sub judice*. Petitioners will inform this Court of the status of that proceeding when it has been finally considered.

even if the latter provision does not in itself constitute a waiver of Federal sovereign immunity. Section 5(b), upon which petitioners sued, permits the SBA "to sue and be sued . . . in any United States district court . . . ." This provision as applied to SBA has been declared an "express statutory consent" to suit. *Mar* v. *Kleppe*, 520 F.2d 867, 870 (10th Cir. 1975). Indeed, this Court held in *RFC* v. *Menihan Corp.*, 312 U.S. 81, 85-86 (1941), that a "sue and be sued" clause places a federal agency "upon an equal footing with private parties as to the usual incidents of suits in relation to the payment of costs and allowances." It ruled in that case that the Reconstruction Finance Corporation (SBA's predecessor agency),[19] just as any private party facing an adverse judgment, had to pay costs pursuant to Rule 54(d), F.R.Civ.P., which, at that time, did not permit the award of costs against the United States unless provided by statute. Under this holding, SBA's "sue and be sued" clause should subject it, just like any private party, to the "usual incidents" of a civil rights action, payment of "attorney's fees as part of the costs" under § 1988.

The court of appeals rejected this contention by holding that a "sue and be used" clause only waives sovereign immunity for relief expressly mentioned in that clause. App. 12a, n.12. Yet, the case upon which the majority relied for this proposition establishes just the opposite, for it states that relief can only escape the waiver of sovereign immunity if the clause so specifies. *FHA* v. *Burr*, 309 U.S. 242, 244 (1940).[20]

[19] S. Rep. No. 83-604, 83rd Cong., 1st Sess. (1953) at 4.

[20] The majority also relied upon *Cassata* v. *Federal Savings and Loan Ins. Corp.*, 445 F.2d 122 (7th Cir. 1971), as a case where a "sue or be sued" agency was denied attorney's fees on the basis of § 2412. Yet, the "sue and be sued" issue was never mentioned in that opinion, and we can only conclude that it was never briefed to the court. Indeed, the plaintiffs in *Cassatta* had no independent statutory basis, such as § 1988, for claiming attorney's fees .

The court of appeals asserted, finally, that Congress could not have intended § 5(b) to make the federal government liable for attorney's fees because the recovery of such fees was not the type of relief granted by federal courts when § 5(b) was enacted. Yet, we have found no other case which limits the waiver associated with a "sue and be sued" clause to the recovery available at the time of the clause's passage. It should be emphasized that there are literally dozens of federal "sue and be sued" clauses, many of which are decades old.[21] The majority's principle, if broadly applied, would wreak havoc in this area of the law. It would impose different obligations on each agency to which a "sue and be sued" clause applied, based on the sheer chance of when that agency's governing statute passed. Clearly, this is a question of wide concern to those who deal with federal entities operating under "sue and be sued" clauses, and therefore we respectfully suggest that this issue as well deserves the attention of this Court.

[21] *See, e.g.*, the Corporation of Foreign Bondholders Act of 1933, 15 U.S.C. § 77dd; the Federal Crop Insurance Act, 7 U.S.C. § 1506 (d) (enacted 1938); the Slum Clearance and Urban Renewal Act of 1949, 42 U.S.C. § 1456(c)(1); the Highway Act of 1950, 12 U.S.C. § 1749a(c)(3); the Veterans Benefits Act of 1958, 38 U.S.C. § 1820 (a)(1); the Trade Expansion Act of 1962, 19 U.S.C. § 1920.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted and the judgment of that court reviewed on the merits.

Respectfully submitted,

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* Petitioners wish to acknowledge the able assistance provided by Daniela R. Winkler, a third-year student at the Harvard Law School, in the preparation of this petition.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1639

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*

v.

BENJAMIN R. CIVILETTI, IN HIS OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,
Appellants

No. 78-2039

MARILYN W. ANDRULIS, *et al.*

v.

UNITED STATES OF AMERICA, *et al.*,
Appellants

Decided September 26, 1979

Before WRIGHT, *Chief Judge*, WILKEY, *Circuit Judge*, and LARSON, *Senior District Judge.**

Opinion for the court filed by *Senior District Judge* LARSON.

Dissenting opinion filed by *Chief Judge* WRIGHT.

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* The Honorable Earl R. Larson, United States Senior District Judge for the District of Minnesota, sitting by designation pursuant to 28 U.S.C. § 292(d).

LARSON, *Senior District Judge*: The above-captioned cases are consolidated on appeal because both raise the same central issue—that is, whether the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, permits an award of fees against the United States. After careful deliberation, we conclude that the Awards Act does not operate as a waiver of sovereign immunity in this context. Therefore, as to the award of attorney's fees by the courts below, we reverse.

In *Andrulis* v. *United States*, plaintiffs Dr. Marilyn W. Andrulis and Andrulis Research Corporation (ARC) brought an action for damages, declaratory and injunctive relief in which they alleged, *inter alia*, that ARC had been unlawfully terminated from a program administered by the Small Business Administration (SBA) pursuant to § 8(a) of the Small Business Act, 15 U.S.C. § 637(a). Section 8(a) empowers the SBA to enter into contracts with other federal departments and agencies and to arrange, without competitive bidding, for the performance of these contracts by small business concerns. In their complaint, plaintiffs charged that ARC had been excluded from the § 8(a) program as a result of race and sex discrimination in violation of 42 U.S.C. §§ 1981, 1985(a) and 2000d.

On November 11, 1977, the district court [1] issued a temporary restraining order in the *Andrulis* case. Thereafter the SBA agreed to reinstate ARC as a participant in the § 8(a) program and the parties entered into a consent decree to that effect. Relying upon 42 U.S.C. § 1988, plaintiffs next applied for and were granted $18,739.00 in attorney's fees and $1,135.03 in costs and disbursements. As to the award of attorney's fees, the government appeals.

[1] The United States District Court for the District of Columbia, the Honorable Gerhard A. Gesell presiding.

NAACP v. *Civilettti*,[1a] the second case before this Court, grew out of the fatal shooting in 1971 of Carnell Russ, a black male, by a white Arkansas law enforcement officer in the course of an arrest for a traffic violation. The officer was subsequently acquitted of manslaughter charges by a state court jury. After reviewing the transcript of the trial proceedings, as well as FBI reports, the Department of Justice decided not to prosecute anyone under the federal criminal civil rights statute, 18 U.S.C. § 242.

Following the decision not to prosecute, the NAACP and the Russ family brought suit under the Civil Rights Act, 42 U.S.C. §§ 1981 and 1985, challenging the adequacy of the federal investigation and the decision not to prosecute. In essence, plaintiffs claimed that the Justice Department had deferred unlawfully to the state proceedings pursuant to a policy established in 1959 by then Attorney General William Rogers of not following a state prosecution with a federal trial for the same act absent compelling reasons. Plaintiffs charged that this policy was unreasonable and racially discriminatory as applied in the Russ case.

In February 1977, while this suit was pending in the district court, Attorney General Griffin Bell issued a memorandum dealing with prosecutions of civil rights violations by the Justice Department. The memorandum indicated that the Department would henceforth evaluate "each and every allegation of a violation of the civil rights laws . . . on its own merits" irrespective of related state enforcement action. Agreeing that the Bell memorandum effectively mooted plaintiffs' claim, the parties to this action moved jointly to dismiss. The district court [2] granted the motion and plaintiffs subsequently sought and

[1a] As amended by order of Sept. 26, 1979, App. 36a-37a, *infra*.]

[2] The United States District Court for the District of Columbia, the Honorable Barrington Parker presiding.

were awarded $26,300.00 in attorney's fees and $612.25 in costs under 42 U.S.C. § 1988. The decision to award attorney's fees is the subject of this appeal.

To recover attorney's fees against the United States, a prevailing party must first surmount a formidable barrier, the doctrine of sovereign immunity. Under well established precedent, waivers of federal sovereign immunity "cannot be implied but must be unequivocally expressed." *United States* v. *King*, 395 U.S. 1, 4 (1969). With respect to awards of attorney's fees, the policy against implied waivers of federal sovereign immunity is embodied in 28 U.S.C. § 2412[3] which has been consistently construed as immunizing the United States against attorney's fees awards absent clear or express statutory authority to the contrary. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 267-68 (1975); *Fitzgerald* v. *United States Civil Service Commission*, 554 F.2d 1186, 1189 (D.C. Cir. 1977); *Natural Resources Defense Council, Inc.* v. *EPA*, 512 F.2d 1351, 1353 (D.C. Cir. 1975). Such clear statutory authority

[3] 28 U.S.C. § 2412 as presently drafted provides:

> "Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. . . .".

Prior to 1966, neither attorney's fees nor costs were recoverable against the United States unless such liability was expressly provided for by act of Congress. In 1966, 28 U.S.C. § 2412 was amended to permit the recovery of costs unless specifically forbidden by statute. Congress, however, explicitly excluded "the fees and expenses of attorneys" from the costs recoverable under § 2412 as a matter of course. Thus, with respect to attorney's fees, § 2412 remains an explicit assertion of sovereign immunity. *See Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 267-68 (1975) ("But § 2412 on its face, and in light of its legislative history, generally bars such awards, which, if allowable at all, must be expressly provided for by statute. . . .".).

may be found in language referring specifically to the liability of the United States. Thus, for example, Title II of the Civil Rights Act of 1964 provides:

> "In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and *the United States shall be liable for costs the same as a private person.*" 42 U.S.C. § 2000a-3(b) (emphasis added).[4]

Alternatively, statutory authorization may be inferred by necessary implication from the statutory context in which a fee provision arises. This rationale was central to the First Circuit's conclusion in *Natural Resources Defense Council, Inc.* v. *EPA*, 484 F.2d 1331 (1st Cir. 1973), that an award of attorney's fees against the federal government was authorized under § 304(d) of the Clean Air Act, 42 U.S.C. § 7604. In that case, the government contended, *inter alia*, that a prevailing party in a citizen suit brought against the United States under § 304 of the Act could not obtain attorney's fees from the federal government because the attorney's fee provision of § 304(d),[5] while providing for recovery by "any party," did not specifically mention the United States by name. The First Circuit responded by noting that the gov-

[4] Other civil rights statutes contain similar language. *See, e.g.*, 42 U.S.C. §§ 2000b-1, 2000e-5(k). In addition, a number of non-civil rights statutes explicitly provide for fee awards against the United States. *See e.g.*, 5 U.S.C. § 552(g)(2)(B) (Freedom of Information Act); 15 U.S.C. § 2059(e) (Consumer Product Safety Act).

[5] Section 304(d) provided:

> "The Court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. . . ."

ernment's "reading of the statute is in sharp conflict with its plain words, which authorize the award against 'any party' and which, in § 304(a), specifically authorize suits with the United States as a party." 484 F.2d at 1336, n.5. Because § 304(a) of the Clean Air Act specifically permitted suits against the Administrator of the EPA, the necessary implication was that Congress had intended the fee provision of § 304(d), which made express reference to § 304(a), to allow recovery against the United States.

In the context of the above discussion, the question before this Court is whether the Civil Rights Attorney's Fees Awards Act of 1976 expressly authorizes the recovery of fees against the United States so as to overcome the barrier of sovereign immunity contained in 28 U.S.C. § 2412. As amended, 42 U.S.C. § 1988 provides in relevant part:

> "In any action or proceeding to enforce a provision of sections [1981, 1985 or 2000d of Title 42] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." [6]

Appellees submit that the Awards Act by its plain language clearly and unequivocally permits awards of attorney's fees against the United States by authorizing a fee award in "any action or proceeding" to enforce, *inter*

[6] In its entirety, 42 U.S.C. § 1988 reads as follows:

"In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 U.S.C. §§ 1981, 1983, 1985, 1986], title IX of [the Education Amendments of 1972], or in any civil action or proceeding, by or on behalf of the United States of America to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

alia, the Reconstruction Era Civil Rights statutes (42 U.S.C. §§ 1981-1983, 1985, 1986) and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Appellees find support for their position in *Hutto* v. *Finney*, 98 S.Ct. 2565 (1978), in which the Supreme Court held the language of the Awards Act sufficient to overcome the immunity granted the states under the Eleventh Amendment to the United States Constitution. In so holding, the Court stated:

> "The Act itself could not be broader. It applies to 'any' action brought to enforce certain civil rights laws. It contains no hint of an exception for State defending injunction actions; . . . ." 98 S.Ct. at 2575.

Similarly, appellees contend, the Awards Act contains no hint of an exception for the federal government.

In their reading of the Awards Act, we think appellees assign too much weight to Congress' use of the phrase "any action." That phrase has repeatedly appeared in attorney's fees provisions, yet when in the past Congress has sought to override 28 U.S.C. § 2412 it has apparently considered it necessary to add a phrase explicitly establishing the liability of the United States.[7] Generally, in construing a statute, we "are obliged to give effect, if possible, to every word Congress used." *Reiter* v. *Sonotone Corp.*, No. 78-690 (S.Ct. June 11, 1979), slip op. at 5, citing *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955). Unless we are to regard the prior specific references to the United States inserted in fee provision statutes as mere surplusage, we must assume that Congress considered the "any action" language insufficient standing alone to waive federal sovereign immunity.

Considering that the Awards Act was enacted largely in response to the Supreme Court's ruling in *Alyeska*

[7] *See, e.g.*, 42 U.S.C. § 2000a-3(b) quoted *supra* and statutes cited at note 4 *supra*.

Pipeline Service Co. v. *Wilderness Society, supra,*[8] and given the *Alyeska* mandate that, to overcome the barrier of 28 U.S.C. § 2412, fee awards against the United States must be "expressly provided for by statute," 421 U.S. at 267-68, it is difficult to believe that if Congress had intended to override § 2412, it would not have used language in the Awards Act at least as clear and unequivocal as it has used in the past to waive federal sovereign immunity. *Cf. Shannon* v. *United States Department of Housing and Urban Development*, 433 F. Supp. 249, 251 (E.D. Pa. 1977), *aff'd*, 577 F.2d 854 (3d Cir.), *cert. denied*, 47 U.S.L.W. 3381 (Dec. 14, 1978) ("The unequivocal language to which the Court adverted in *Alyeska* and that contained in [prior statutes authorizing attorney's fees awards against the United States] stands in stark contrast to the silence of the Fees Awards Act.") Instead, the only specific waiver contained in the Awards Act occurs with respect to actions brought "by or on behalf of the United States . . . to enforce, or charging a violation of, a provision of" the Internal Revenue Code. *See Aparacor, Inc.* v. *United States*, 571 F.2d 552 (Ct. Cl. 1978). While the liability of the United States for fees in tax cases might have been more specifically defined, Congress' intent to waive federal immunity in the IRS suits is necessarily inferred since the United States and the taxpaying public are the only parties conceivably included within the provision, and the Awards Act allows an award to "the prevailing party other than the United States." No similar inference necessarily arises with respect to the remaining portions of the Act since the United States is neither the sole nor even the most likely defendant under the civil rights statutes in question.[9]

[8] *See* H. Rep. No. 94-1558, 94th Cong., 2d Sess. at 2 (1976); S. Rep. No. 94-1011, 94th Cong., 2d Sess. at 1 (1976).

[9] Actions under the Reconstruction Era Civil Rights statutes are generally brought by individuals against other individuals or against state or local governments. *See Hutto* v. *Finney, supra*, 98 S.Ct. at 2575. On their face, these statutes contain no waiver of federal sovereign immunity nor do they appear to create a cause of action against the United States as an entity. With respect to Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, at the time the Awards Act was passed Congress was uncertain whether a private action could even be brought under these statutes. Since that time, the Supreme Court has ruled that private causes of action are cognizable under Title IX. *Cannon* v. *University of Chicago*, 47 U.S.L.W. 4549 (May 14, 1979).

Considering the plain language of the Awards Act, we agree with the government that the most that can fairly be said is that the Act does not, on its face, preclude an assessment of attorney's fees against the United States. As this Court indicated in *Fitzgerald* v. *United States Civil Service Commission, supra*, 554 F.2d at 1189, however, the "absence of" language "contrary" to an award of attorney's fees against the government is not enough. There "must be [an] unequivocally expressed" affirmative authorization to overcome 28 U.S.C. § 2412.

We find nothing in the Supreme Court's opinion in *Hutto* v. *Finney, supra*, to contradict our reading of the Awards Act. In ruling that state and local governments are liable for attorney's fees under the Act, the Court in *Hutto* v. *Finney* rejected the state's argument that in order to abrogate the state's immunity under the Eleventh Amendment, Congress must "enact express statutory language making the states liable." 98 S.Ct. at 2576. The Court emphasized that the Act imposes attorney's fees "as a part of costs" and that costs have traditionally been awarded against the states without regard to the Eleventh Amendment. *Id.* The Court then concluded:

> "It is much too late to single out attorney's fees as the one kind of litigation costs whose recovery may not be authorized by Congress without an express statutory waiver of the States' immunity." *Id.* at 2577-78.

In *Hutto* v. *Finney*, the Supreme Court considered the absence of an express statutory waiver no obstacle to an award of attorney's fees against the states. The same cannot be said with respect to federal liability. In the case of the federal government, there is no long tradition of awarding costs as a matter of course. Instead, prior to the amendment of 28 U.S.C. § 2412 in 1966, costs were recoverable against the United States only if expressly provided for by statute.[10] Moreover, § 2412 explicitly requires what the Supreme Court concluded the Eleventh Amendment does not—that is, an express abrogation of immunity from attorney's fees awards.

In concluding that the Awards Act authorizes awards of fees against the states, the Court in *Hutto* v. *Finney* also relied on legislative history which focused directly on state liability and established unequivocally that Congress intended the Awards Act to waive state immunity. 98 S.Ct. at 2575-76. No such unequivocal indication of congressional intent exists with respect to the issue of federal immunity. The floor debate surrounding passage of the Awards Act contains indications of divergence of opinion among members of Congress as to the implications of the Act for federal liability.[11] The House and

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[10] See discussion note 3 *supra*.

[11] Thus, for example, Congressman Railsback, the ranking Republican on the House Judiciary Committee which drafted the Awards Act, seemed to suggest that attorney's fees might be recoverable against the United States when, in response to a question, he said:

> "Mr. Speaker, if the gentleman will yield further, again it would be in the discretion of the court and nowhere in the bill do we prevent a school district or college from recovering reasonable attorneys fees, even in a case where the United States is a party plaintiff." 121 Cong. Rec.H. 12164 (daily ed., October 1, 1976).

However, a contrary stance appears to have been taken by Congressman Rodino, the Chairman of the House Judiciary Committee, in his response to a request from Senator Kennedy for comments on an

Senate Committee Reports on the attorney's fee legislation contain no discussion of the question of federal liability. This silence appears significant since the Committee Reports are the references members of Congress are probably most likely to consult before casting their votes for an understanding of the purpose and effect of a bill. *Maestro Plastics* v. *NLRB*, 350 U.S. 270, 287-89 (1956); *American Airlines, Inc.* v. *CAB*, 365 F.2d 939 (D.C. Cir. 1966); Sutherland, Statutes and Statutory Construction, § 48.06, p. 203 (4th ed.). Had Congress intended to abrogate federal sovereign immunity for purposes of the Awards Act, some discussion of the matter by the respective House and Senate Committees responsible for the legislation in their Committee Reports might have been expected.

The only direct support found in either Committee Report for the proposition that the federal government might be liable for fees under the Awards Act is a citation to *Gatreaux* v. *Hills*, 425 U.S. 284 (1976), a case involving a Title VI claim brought against the Secretary of Housing and Urban Development, which appears in the House Report as part of a string of cases cited as examples of instances in which government officials have been defendants in civil rights actions. H. Rep. No. 94-1558, 94th Cong., 2d Sess. at 7 (1976). This oblique reference to federal liability is, we think, hardly sufficient

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amendment offered by Senator Goldwater which would have subjected the United States to broad liability for attorney's fees in tax cases:

> "I fear that Senator Goldwater's amendment . . . will jeopardize the Civil Rights Attorney's Fees Awards Act of 1976. S. 2278 presently is a very narrow bill. . . . It does not involve federal spending. . . . The Committee is presently studying other bills, like Senator Goldwater's, which would go far beyond the 'American Rule' or the 'private attorney general' exception to it, and which may allow recovery against the Federal Government. We hope to take action next Congress on such bills." 122 Cong. Rec. S. 16490 (daily ed., Sept. 23, 1976).

to constitute the kind of clear statutory authorization required to waive federal sovereign immunity with respect to attorney's fees awards.[12]

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[12] Appellees in the *Andrulis* case offer two additional theories under which they submit the award of attorney's fees in their case might be sustained. We find neither of these theories persuasive. Appellees rely on the language of § 5(b) of the Small Business Act, 15 U.S.C. § 634(b) which provides that the Administrator of the SBA may "sue and be sued . . . in any United States district court. . . ." Appellees submit that the "sue and be sued" clause, which places the SBA on a par with private parties for purposes of federal court litigation, *Mar* v. *Kleppe*, 520 F.2d 867, 870 (10th Cir. 1975), constitutes an "express statutory consent" satisfying the requirements of 28 U.S.C. § 2412.

We acknowledge that through the "sue and be sued" clause Congress has provided a limited waiver of the sovereign immunity generally afforded agencies of the federal government. However, it is well established that Congress in waiving governmental immunity has the power to waive immunity entirely or to waive it for some purposes and retain it for others. *See Federal Housing Administration Region No. 4* v. *Burr*, 309 U.S. 242, 244 (1939), and cases cited therein. Congress made no mention of attorney's fees in permitting the Administrator of the SBA to "sue and be sued." Moreover, the clause was enacted at a time when, under the "American Rule," the payment of attorney's fees would not have been regarded as an ordinary incident of litigation. Thus it seems logical to assume that in subjecting the SBA to suit Congress did not expect the government to be liable for attorney's fees. In any event, because § 5(b) of the Small Business Act neither directly nor expressly authorizes an award of fees, it appears inadequate on its face to override the general bar of 28 U.S.C. § 2412. *See Cassata* v. *Federal Savings and Loan Insurance Corp.*, 445 F.2d 122 (7th Cir. 1971) (Section 2412 held to preclude the recovery of attorney's fees from the FSLIC which, like the SBA, is a "sue and be sued" agency, *see* 12 U.S.C. § 1725(c)(4)).

In the alternative, appellees contend that an amendment to the Administrative Procedure Act (APA) enacted contemporaneously with the Awards Act contains an express waiver of sovereign immunity sufficient to sustain an award of fees in the instant case. The APA amendment provides:

> "An action in a court of the United States seeking relief other than money damages . . . shall not be dismissed nor relief therein be denied on the ground that it is against the United States. . . ." 5 U.S.C. § 702.

[Footnote continued on page 13a]

Given the importance of attorney's fees in ensuring enforcement of our civil rights laws, a strong policy argument can be made that the Awards Act should permit the recovery of attorney's fees against the federal government.[13] We leave for the Congress, however, the decision of whether to amend the Awards Act to explicitly allow

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[12] [Continued]

Appellees submit that § 702 expressly waives sovereign immunity for relief against the United States, except for money damages, and the Awards Act provides a type of relief, attorney's fees, which the Supreme Court has concluded do not constitute money damages. *Hutto* v. *Finney, supra*, 98 S.Ct. at 2576, n. 24. Together, appellees claim, these statutes combine to expressly authorize the award of fees against the United States.

While imaginative, appellees' argument is unconvincing. The legislative history surrounding passage of the APA amendment suggests that Congress sought by the amendment to achieve the narrow purpose of withdrawing the defense of sovereign immunity in actions against federal agencies in which "specific relief" such as "an injunction, declaratory judgment, or writ of mandamus" not requiring any federal expenditure was sought. H. Rep. No. 94-1656, 94th Cong., 2d Sess. at 4-5 (1976). The amendment says nothing about the recovery of attorney's fees ancillary to such an action and, indeed, the amendment itself provides that "nothing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. Section 2412 forbids the award of attorney's fees against the United States absent express statutory authorization. We do not view the APA amendment as satisfying or modifying in any way that requirement.

[13] In this regard, the Committee Report accompanying the Senate version of the Act notes as particularly apt a Supreme Court opinion containing the following quotation of former Justice Tom Clark in a suit brought under the Landrum-Griffin Act:

> "Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. . . . Without counsel fees the grant of Federal jurisdiction is but an empty gesture. . . . *Hall* v. *Cole*, 412 U.S. 1 (1973), quoting 462 F.2d 777, 780-81 (2d Cir. 1972)." S. Rep. No. 94-1011, 94th Cong., 2d Sess. at 3 (1976).

The same comment might appropirately be made with respect to enforcement of the rights afforded under the civil rights statutes as applied to the federal government.

recovery of fees against the United States, realizing that to do otherwise would be to exceed the limits of our interpretive function.

Insofar as they award attorney's fees to appellees, the orders of the district courts are reversed.

WRIGHT, *Chief Judge, dissenting*: The Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976), authorizes the award of attorneys' fees to "the prevailing party, other than the United States," in "any action or proceeding to enforce [certain civil rights laws]." [1] The "necessary implication," *see* majority opinion at 6, from the language of the statute, the purposes behind its enactment, and its legislative history is that Congress intended to authorize fee awards against the United States under the Act.[2] Appellees in both cases before us are "prevailing parties" within the meaning of the Act. For these reasons, I would affirm the judgments of the District Court in both cases.

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[1] 42 U.S.C. § 1988 (1976) provides in relevant part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. § 1681 et seq.], or in any civil action or proceedings, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(Brackets in original.) *NAACP* v. *Civiletti*, No. 78-1639, was brought under, *inter alia*, 42 U.S.C. §§ 1981, 1985 (1976). *Andrulis* v. *United States*, No. 78-2039, alleged discrimination in violation, *inter alia*, of 42 U.S.C. §§ 1981, 1985 (1976).

[2] Appellees in *Andrulis* v. *United States*, No. 78-2039, suggest two additional theories on which the award of attorneys' fees in that case might be sustained. *See* majority opinion at 13 n.12. Because I conclude that § 1988 authorizes awards against the federal government, I do not reach these alternative arguments.

I

The majority rightly points out that a party seeking to recover attorneys' fees against the United States must surmount the barrier posed by the doctrine of sovereign immunity.[3] A waiver of sovereign immunity " 'cannot be implied but must be unequivocally expressed.' " *United States* v. *Testan*, 424 U.S. 392, 399 (1976), *quoting United States* v. *King*, 395 U.S. 1, 4 (1969). The Supreme Court in *Testan* described the test for the specificity required as "whether any federal statute 'can fairly be interpreted as mandating compensation by the Federal Government * * *.' *Eastport S. S. Corp.* v. *United States*, 178 Ct. Cl., at 607, 372 F.2d, at 1009; *Mosca* v. *United States*, 189 Ct. Cl. 283, 290, 417 F.2d 1382, 1386 (1969), cert. denied, 399 U.S. 911 (1970). We are not ready to tamper with these established principles * * *." 424 U.S. at 400. Thus the question presented by these cases is whether Section 1988 "can fairly be interpreted as mandating [payment of attorneys' fees] by the Federal Government." The majority says that this may be done in one of two ways: (1) statutory language that specifically refers to the liability of the United States; and (2) necessary implication from the statutory context in which the fee provision arises. Majority opinion at 5-6. In my view, Section 1988 satisfies the latter test.

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[3] In this particular context this doctrine is reiterated in 28 U.S.C. § 2412 (1976), which proscribes fee awards against the United States except where specifically provided for by statute. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 257-259 (1975). Section 2412 states:

> Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys[,] may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. * * *

II

Congress enacted Section 1988 in response to the Supreme Court decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). In *Alyeska* the Court held that federal courts do not have the power to award attorneys' fees to prevailing parties without specific statutory authorization. Prior to that decision lower federal courts had followed the fee-shifting policies Congress enacted in the attorneys' fees provisions of several civil rights statutes, for example, Titles II and VII of the Civil Rights Act of 1964,[4] 42 U.S.C. §§ 2000a-3(b), 2000e-5(k) (1976), and awarded attorneys' fees to prevailing parties in cases brought under other civil rights laws.[5] In Congress' view *Alyeska*

> created anomalous gaps in our civil rights laws whereby awards of fees are * * * suddenly unavailable in the most fundamental civil rights cases. For instance, fees are now authorized in an employment discrimination suit under Title VII * * *, but not in the same suit brought under 42 U.S.C. § 1981, which protects similar rights but involves fewer technical prerequisites to the filing of an action. * * *

S. Rep. No. 94-1011, 94th Cong., 2d Sess. 4 (1976). To eliminate these "anomalous gaps" Congress enacted the Civil Rights Attorneys' Fees Awards Act.

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[4] Title II of the Civil Rights Act of 1964 provides:

> In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000a-3(b) (1976).

[5] *See, e.g., Sims* v. *Amos*, 340 F.Supp. 691 (M.D. Ala.) (three-judge court), *aff'd*, 409 U.S. 942 (1972); *Stanford Daily* v. *Zurcher*, 366 F.Supp. 18 (N.D. Cal. 1973), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547 (1978).

One theme that runs through the legislative history of the Act is the belief that attorneys' fees awards are crucial to vigorous enforcement of the civil rights statutes covered by Section 1988. Quoting the words of the late Supreme Court Justice Tom Clark, the Senate Report declared:

> "Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. * * * Without counsel fees the grant of Federal jurisdiction is but an empty gesture * * *. *Hall* v. *Cole*, 412 U.S. 1 (1973), quoting 462 F.2d 777, 780-81 (2d Cir. 1972)."

S. Rep. No. 94-1011, *supra*, at 3.[6] The award of attorneys' fees is crucial because these civil rights laws depend heavily on private enforcement.[7] And as this court has noted, the policy favoring private enforcement of the civil rights laws is particularly compelling when a federal agency or official is the defendant. Unlike the

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[6] Senator Kennedy said in the Senate:

> It is a fundamental axiom of law that where there is a right the law should provide a remedy. Yet, without a provision to permit awards of attorneys' fees to successful parties, the rights secured by those civil rights laws covered by this act are hollow rights indeed. Enactment of this legislation would do much to assure all the citizens of this Nation that the words "equal protection of law" mean what they say, and that Congress firmly intends that all our civil rights laws be vigorously enforced.

122 CONG. REC. S 16252 (daily ed. Sept. 21, 1976), Congressman Drinan remarked in the House:

> If Federal laws providing for the protection of civil constitutional rights are to be fully enforced, Congress must provide effective remedies for the vindication of those guarantees. Authorizing the award of reasonable counsel fees is an important tool for effectuating that purpose.

122 CONG. REC. H 12160 (daily ed. Oct. 1, 1976).

[7] S. Rep. No. 94-1011, 94th Cong., 2d Sess. 2 (1976); H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 1 (1976).

cases involving private or state defendants, the complainants are not merely "private attorneys general"; they are the only attorneys general.[8] The Department of Justice does not sue other federal government agencies for violations of the civil rights laws. Indeed, as in the instant cases, the Justice Department is frequently counsel for the other side. Thus the reasons behind the enactment of Section 1988 support the inference that it authorizes awards of attorneys' fees against the United States and caution against interpreting the statute in a manner that will frustrate Congress' purposes.[9] As this court has said, "[O]ur duty is to favor an interpretation which would render the statutory design effective in terms of the policies behind its enactment and to avoid an interpretation which would make such policies more difficult of fulfillment, particularly where * * * that interpretation is consistent with the plain language of the statute." *National Petroleum Refiners Ass'n* v. *FTC*, 482 F.2d 672, 689 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). This is particularly essential where civil rights statutes are involved. Courts must accord such a statute "a sweep as broad as its language." *United States* v. *Price*, 383 U.S. 787, 801 (1966); *Jones* v. *Alfred H. Mayer Co.*, 392

[8] *Parker* v. *Califano*, 561 F.2d 320, 331 (D.C. Cir. 1977).

[9] Courts have construed civil rights attorneys' fees provisions very broadly in order to further Congress' purposes. Thus the Supreme Court held in *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), that notwithstanding the statutory language that the District Court "in its discretion" may award costs to the prevailing party, the purpose of encouraging private enforcement dictates that a prevailing party should recover attorneys' fees "unless special circumstances would render such an award unjust." *Id.* at 402. In *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), the court observed: "This Court, as part of its obligation 'to make sure that Title VII works,' has liberally applied the attorney's fees provision of Title VII, recognizing the importance of private enforcement of civil rights legislation." *Id.* at 716 (footnote omitted) (*quoting Culpepper* v. *Reynolds Metals Co.*, 421 F.2d 888, 891 n.3 (5th Cir. 1970)).

U.S. 409, 437 (1968); *Griffin* v. *Breckenridge*, 403 U.S. 88, 97 (1971).

III

Congress used very broad language when it enacted Section 1988. The Act authorizes the award of attorneys' fees in "*any* action or proceeding." (Emphasis added.) The Supreme Court recently confirmed the Act's broad reach when it held in *Hutto* v. *Finney*, 437 U.S. 678 (1978), that the language of the statute was sufficient to overcome the states' Eleventh Amendment immunity. In so holding the Court said:

> The Act itself could not be broader. It applies to "any" action brought to enforce certain civil rights laws. It contains no hint of an exception for States defending injunction actions * * *. * * *

Id. at 694. The language of the Act is also broad enough to apply to actions against the federal government. While the Act does not specifically mention the liability of the United States in civil rights cases,[10] not every attorneys'

[10] Section 1988 authorizes fee awards to the prevailing party in "any civil action or proceedings, by or on behalf of the United States of America, to enforce, or charging a violation of, * * * the * * * Internal Revenue Code * * *." The Government argues that this is the only specific waiver in § 1988, and that the failure to mention the United States in the civil rights portion of § 1988 as well shows that the "any action" reference does not apply to the United States.

This argument is unpersuasive. The IRS section was an amendment to the original bill sponsored by Senator Allen. It was accepted by the bill's sponsors as a compromise to end a filibuster of the bill led by Senator Allen. The purpose of the Allen amendment was to provide relief to taxpayers who are being harassed by the Government.

> We know all too well the proclivity of the IRS to harass taxpayers * * *. [I]f the Government harasses a taxpayer, * * * then the Government should be required to pay that attorney fee.

[Footnote continued on page 20a]

fees provision that has been found to authorize fee awards against the federal government has specifically mentioned the liability of the United States.

For example, in *Natural Resources Defense Council, Inc.* v. *EPA*, 484 F.2d 1331 (1st Cir. 1973), the First Circuit held that Section 304(d) of the Clean Air Act, now codified at 42 U.S.C. § 7604(d) (Supp. I 1977), authorized an award of attorneys' fees against the United States. The court rejected the Government's claim that fee awards against the federal government were not authorized because the Act's "any party" language did not specifically refer to the liability of the United States.[11]

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[10] [Continued]

122 CONG. REC. S 16428 (daily ed. Sept. 22, 1976) (remarks of Sen. Allen). Since the Allen amendment only authorizes fee awards in certain actions *brought by the IRS*, it could not have used the term "any action" or "any action under the Internal Revenue Code." Hence, by mentioning the United States specifically in the IRS portion of § 1988 Congress merely intended to make it plain that § 1988 does not apply to all tax cases. On the other hand, in enacting the civil rights fee provision "Congress firmly intend[ed] that *all* our civil rights laws be vigorously enforced." 122 CONG. REC. S 16252 (daily ed. Sept. 21, 1976) (remarks of Sen. Kennedy) (emphasis added).

Indeed, a strightforward reading of the statute suggests the exact opposite of the Government's contention. The phrase "any action or proceeding" is used twice in the statute. The natural inference is that the phrase has the same meaning and coverage in the two uses (this explains why the limiting language "by or on behalf of the United States of America" was necessary). Since the phrase unmistakably encompasses awards against the United States in the IRS context, it is reasonable to assume that the same holds for the civil rights use.

[11] Section 304(d) provides:

> The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. * * *

42 U.S.C. § 7604(d) (Supp. I 1977).

Moreover, this court recently held, without opposition from the Government, that the recent amendment of Section 307 of the Clean Air Act, 42 U.S.C. § 7607(f) (Supp. I 1977), to permit fee awards "[i]n any judicial proceeding under this section"[12] authorizes fee awards against the federal government. *Sierra Club* v. *EPA*, D.C. Cir. No. 76-1037, order of April 27, 1979 (award of attorneys' fees of $11,760 to Sierra Club ordered paid by EPA) (case consolidated with *ASARCO* v. *EPA*, D.C. Cir. No. 76-1030). Equally instructive is the fact that Congress only recently enacted Section 505(b) of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 92 STAT. 2983, an attorneys' fees provision which, in the words of its sponsor, "parallels the Civil Rights Attorneys' Fees Awards Act of 1976 * * *." 124 CONG. REC. S. 15590 (daily ed. Sept. 20, 1978) (remarks of Sen. Cranston). The language of Section 505(b) is virtually the same as that of Section 1988.[13] Section 505(b)'s sponsor and the accompanying Committee Reports made it clear that this attorneys' fee provision is to be used to vindicate rights against the federal government.[14] If

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[12] 42 U.S.C. § 7607(f) (Supp. I 1977) states:

> In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

[13] Section 505(b) provides:

> In any action or proceeding to enforce or charge a violation of a provision of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

[14] Senator Cranston, in introducing the attorneys' fees provision, said:

> Mr. President, the rights extended to handicapped individuals under title V of the Rehabilitation Act of 1973—Federal Government employment, physical accessibility in public buildings, employment under Federal contracts, and non-discrimina-

Congress thought Section 505(b) was precise enough to apply to the United States, then the same may be said of the statute after which it was modeled, Section 1988.

IV

The legislative history of Section 1988 provides substantial support for the conclusion that Congress intended to authorize fee awards against the United States under the Act.

A

There are numerous indications in the Senate and House Reports that Congress intended Section 1988 to have substantially the same coverage as the attorneys' fees provisions of the 1964 Civil Rights Act which apply to the federal government. Both Reports stressed the fact that the legislation was designed to make our civil rights laws consistent. The Senate Report said: "The purpose of this amendment is to remedy anomalous gaps in our civil rights laws created by [the *Alyeska* decision], and to achieve consistency in our civil rights laws." S. Rep. No. 94-1011, *supra*, at 1. In a similar vein the House Report stated: "In order to achieve uniformity in the remedies provided by Federal laws guaranteeing civil and constitutional rights, it is necessary to add an attorney fee authorization to those civil rights acts which do not presently contain such a provision." H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 1 (1976). Both Reports stressed that Section 1988 was fashioned after the

tion under Federal grants—are and will continue to be in need of constant vigilance by handicapped individuals to assure compliance. Pri[va]te enforcement of these title V rights is an important and necessary aspect of assuring that these rights are vindicated and enforcement is uniform. The availability of attorneys' fees should assist substantially in this respect. * * *

124 CONG. REC. S 15590 (daily ed. Sept. 20, 1978). *See also* S. Rep. No. 95-890, 95th Cong., 2d Sess. 19 (1978).

attorneys' fees provisions of the 1964 Civil Rights Act. The Senate Report noted: "S. 2278 follows the language of Titles II and VII of the Civil Rights Act of 1964 * * *." S. Rep. No. 94-1011, *supra*, at 2. The House Report stated: "H.R. 15460 tracks the language of the counsel fee provisions of Titles II and VII of the Civil Rights Act of 1964 * * *." H.R. Rep. No. 94-1558, *supra*, at 5. The Reports also explained that the standards for awarding fees under Section 1988 would "be generally the same as under the fee provisions of the 1964 Civil Rights Act." S. Rep. No. 94-1011, *supra*, at 4. The natural inference from all these factors is that Congress intended Section 1988's coverage to be the same as the coverage of the fee provisions of the 1964 Act. That Congress omitted the language specifically referring to the liability of the United States for attorneys' fees is not significant.[15] Given all the indications that Congress intended Section 1988 to be just like the other civil rights attorneys' fees provisions, it is reasonable to assume that if Congress had intended to depart from the norm by immunizing the federal government from liability it would have done so explicitly.

The majority agrees that another section of the House Report contains further support for the view that Section 1988 applies to the federal government. *See* majority opinion at 12-13. In discussing the issue of fee awards to prevailing defendants, the House Report pointed out:

> [I]t should further be noted that governmental officials are frequently the defendants in cases brought under the statutes covered by H.R. 15460 [the bill which became § 1988]. *See, e.g.*, * * * *Gautreaux*

[15] The inference that the omission was deliberate and significant would have been more plausible if the same Congress had drafted the two statutes, or if in place of the "any party" language the fee provisions listed the parties covered, and the United States was included in one list but not in the other.

> v. *Hills*, [425 U.S. 284 (1976)]. Such governmental entites and officials have substantial resources available to them through funds in the common treasury, including the taxes paid by the plaintiffs themselves. * * * The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities.

H.R. Rep. No. 94-1558, *supra*, at 7 (footnote omitted). By citing *Gautreaux* v. *Hills*, a case involving a Title VI claim brought against a federal cabinet officer, as an example of a case in which a government official could be a defendant in a civil rights suit, and by pointing out that such officials would be liable for fee awards under Section 1988, the Report supports the inference that Congress intended the federal government to be liable for fee awards.

B

Both the majority in its opinion and the Government in its briefs have studiously avoided any mention of the hearings on the legislation that became Section 1988. This is unfortunate because the report of these hearings shows that even the Department of Justice, represented by Rex E. Lee, Assistant Attorney General for the Civil Division, recognized that the legislation before the House Subcommittee would authorize fee awards against the federal government. In his testimony *in support* of the legislation, Mr. Lee said:

> H.R. 8220 would authorize the awarding of attorneys' fees to a prevailing plaintiff in actions brought under certain civil rights statutes. *Actions under the statutes involved have been brought against both Federal officers and private individuals.*
>
> * * * *
>
> H.R. 9552 authorizes the awarding of attorneys' fees as a matter of discretion in certain civil rights

> litigation. The prevailing party, other than the United States, may recover attorneys' fees.
>
> Thus, H.R. 9552 applies to *all plaintiffs or defendants except to the United States to the extent that it is a prevailing party.*

AWARDING OF ATTORNEYS' FEES, *Hearings Before the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice*, 94th Cong., 1st Sess. 176-177 (1975) (emphasis added) (hereinafter "House Hearings").[16] Equally revealing is the statement by Congressman Drinan. In introducing H.R. 9552 and several other attorneys' fees provisions he told the Subcommittee that:

> [U]nder these bills the Federal government could never recover its attorneys fees. *On the other hand, it would be required to pay the counsel fees of a private prevailing party, which is prohibited generally by current law (see 28 U.S.C. 2412). These bills, if enacted, would be exceptions to the general prohibition in 28 U.S.C. 2412. That section need not be amended, however, since it now states: "Except as otherwise specifically provided by statute. . . ."*

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[16] Mr. Lee went on:

> [The Department of Justice expresses] support in principle for H.R. 8220 and H.R. 9552, awarding of attorneys' fees to a prevailing party in civil rights actions under the revised statutes (sections 1981, 1982, and 1983, 1985, and 1986, of title 42, United States Code).

AWARDING OF ATTORNEYS' FEES, *Hearings Before the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice*, 94th Cong., 1st Sess. 179 (1975) (hereinafter "House Hearings"). H.R. 8220 and H.R. 9552 differed from each other only in that the former made the award of attorneys' fees mandatory whereas the latter made it discretionary. Mr. Lee favored discretionary awards and also had reservations about fee awards in every § 1983 case. Thus he supported the bills "in principle." *See* House Hearings at 176-180.

House Hearings at 53 (emphasis added). H.R. 9552 became the House version of the legislation that was enacted as Section 1988. The language of H.R. 9552 was virtually identical to Section 1988 as it passed Congress.[17] To be sure, courts are generally wary of testimony before committee hearings as aids to statutory construction. *See S&E Contractors, Inc.* v. *United States*, 406 U.S. 1, 13 n.9 (1972). However, courts are willing to attach great weight to such testimony when it consists of "precise analyses of statutory phrases by the sponsors of the proposed laws." *Id.* Congressman Drinan introduced H.R. 9552 to the House Judiciary Subcommittee and was the chief sponsor of Section 1988 in the House. Both the House Report and the floor debates referred to Mr. Lee as a principal source of interpretation for Section 1988.[18]

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[17] H.R. 9552 provided:

> In any action to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, reasonable attorney fees as part of the costs.

House Hearings, *supra* note 16, at 244. This bill was approved by the House Judiciary Subcommittee with a technical amendment which conformed it to the Senate version, S. 2278, which at the time had cleared the Senate Judiciary Committee and was awaiting action by the full Senate. H.R. 9552 was subsequently approved by the House Judiciary Committee with an amendment that added title IX of Public Law No. 92-318 to the statutes covered by the bill. A clean bill, H.R. 15460, was then reported to the full House. Other than the addition of title IX the only differences between H.R. 9552 and H.R. 15460 (the clean bill) were technical changes, not affecting the substance, made on the advice of the House Parliamentarian and staff and legislative counsel. *See* H.R. Rep. No. 94-1558, *supra* note 7, at 3-4 & n.4. Time pressures made it necessary for the House to adopt the Senate version, S. 2278, in place of H.R. 15460. However, the two bills were nearly identical.

[18] *See, e.g.*, H.R. Rep. 94-1558, *supra* note 7, at 6; 122 CONG. REC. H 12162 (daily ed. Oct. 1, 1976) (remarks of Rep. Kastenmeier).

C

Much of the Government's purported support for its claim that Section 1988 does not authorize awards against the United States derives from the floor debates. However, fairly considered the debates offer the Government little support. Rather, they support the conclusion that Congress intended Section 1988 to apply to the United States.

1. *The Senate Debates*

In his remarks in support of the bill Senator Hugh Scott, who opened the debate on S. 2278, explained that its enactment would "assure that attorneys' fees will be available in suits brought under the reconstruction-era civil rights laws, * * * *in the same fashion and to the same extent as the statutes presently provide in cases brought under title VII of the 1964 Civil Rights Act.*" 122 CONG. REC. S 16251 (daily ed. Sept. 21, 1976) (emphasis added). Since the United States is liable for attorneys' fees in Title VII cases, the natural inference from this is that fees may be awarded against the United States under Section 1988.

The Government relies on an amendment offered by Senator Helms, an opponent of the bill, which purportedly shows that he understood the bill not to apply to the United States. However, a closer examination of the Helms amendment shows that Senator Helms misunderstood the import of the phrase "other than the United States." Section 1988 authorizes the award of fees to "the prevailing party, other than the United States * * *." The amendment would have inserted the phrase "or any State * * * or any political subdivision thereof" after the latter phrase. 122 CONG. REC. S 16433 (daily ed. Sept. 22, 1976). But the effect of this addition would have been to deny *both* the United States *and* state and local governments the right to recover attorneys' fees if they

were prevailing parties. On the other hand, it is significant that Senator Allen, a principal opponent of the bill,[19] understood it to permit awards against the federal government. He unsuccessfully sponsored an amendment that would have limited the liability of the United States to situations in which an official of the federal government "has acted in a contumacious or vexatious manner." 122 CONG. REC. S 16567 (daily ed. Sept. 24, 1976).[20]

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[19] Senator Allen led a filibuster against the bill which he ended only when the bill's sponsors compromised by accepting an amendment that he proposed. *See* 122 CONG. REC. S 17050 (daily ed. Sept. 29, 1976); note 10 *supra*.

[20] The Government points to a Congressional Budget Office (CBO) "estimate" (*see* S. Rep. No. 94-1011, *supra* note 7, at 7; H.R. Rep. No. 94-1558, *supra* note 7, at 10) that enactment of the bill would result in no additional costs to the Government. This "no cost" feature of the bill was referred to in the floor debates. A few points are worth noting in assessing the significance of this "no additional costs" estimate. First, it appears that attorneys' fees awards against the Government are paid from the Department's existing appropriations. Mr. Lee confirmed this in his testimony before the House Judiciary Subcommittee. He said:

> [A]ttorneys' fees awards * * * necessarily *reduce* available resources, with concommitant impact on other Government programs.

House Hearings, *supra* note 16, at 178 (emphasis added). Thus the CBO did not foresee any additional costs (*i.e.*, new appropriations) to the Government. Second, it is significant that although the United States is liable for attorneys' fees under other civil rights statutes passed prior to § 1988, and is liable under § 1988 to prevailing defendants in some internal revenue cases, there is no line item in the Justice Department's appropriations for such payments. These payments are apparently made from a general fund for "expenses necessary for the legal activities of the Department of Justice * * *." Pub. L. No. 95-431, 92 STAT. 1026. Third, it would have been incongruous for CBO or Congress to "estimate" the expenditures required to compensate individuals for the federal government's abridgement of civil rights laws. Finally, the amounts involved are likely to be minimal unless one assumes wholesale violations of civil rights laws by federal government agencies or officials. In light of all these factors, and given the other indications that Congress intended § 1988 to apply to the United States, it is reasonable to conclude that the CBO "estimate"

2. *The House Debates*

The majority acknowledges that there is support in the report of the floor debates in the House for the conclusion

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is not incompatible with the conclusion that § 1988 authorizes awards against the federal government.

Much the same explanation can be given to a letter written by Congressman Rodino, Chairman of the House Judiciary Committee, introduced during the Senate debate on a proposed amendment to S. 2278 that would have subjected the United States to broad liability for tax cases. In the letter Mr. Rodino expressed concern that the amendment could jeopardize Administration support for the bill and weaken its chances for enactment. He said:

> I fear that Senator Goldwater's amendment—lacking a careful analysis by the Administration, and in light of the Administration's prior position on another IRS attorney fee provision—will jeopardize the * * * Act * * *. S. 2278 is presently a very narrow bill intended to enable private enforcement of civil rights acts. It does not involve federal spending, and has specifically been supported by the Administration at a hearing before [a] House Subcommittee * * *.
>
> The Committee is presently studying other bills, like Senator Goldwater's, which would go far beyond the "American Rule," or the "private attorney general" exception to it, and which may allow recovery against the Federal Government. We hope to take action next Congress on such bills. However, I fear that quick action on the Goldwater amendment, which goes far beyond the narrow provisions of S. [2]278, would defeat the bill.

122 CONG. REC. S 16490 (daily ed. Sept. 23, 1976). The majority cites this letter as evidence that some members of Congress did not think that S. 2278 applied to the United States. Majority opinion at 11 n.11. While it is possible to interpret Mr. Rodino's letter in this manner, it is equally plausible that it merely reflects his expectation that the federal government will not often be guilty of violating civil rights laws and, hence, fee awards against the United States will be minimal. In this regard it is significant that Congressman Rodino did not challenge Congressman Railsback's statement, made in the House at a time when the debate specifically focused on the question of the liability of the United States, that § 1988 allows recovery of attorneys' fees from the federal government. *See* text at notes 21-22 *infra*. Congressman Rodino's real concern was with the broad scope of the proposed amendment—its possible impact on Administration support and therefore on the bill's chances for enactment—not the question whether § 1988 allows recovery against the federal government.

that Section 1988 applies to the United States. In the only portion of the House debates that directly addressed the question of the liability of the United States under Section 1988, Congressman Railsback, the ranking Republican on the House Judiciary Subcommittee which drafted the House version of the legislation that became Section 1988 and a strong supporter of the bill, made it quite clear that it applied to the United States. The colloquy between Mr. Railsback and Mr. Quie is very revealing.

> Mr. QUIE. * * *
>
> I would like to ask the minority member, the gentleman from Illinois (Mr. RAILSBACK), a question. * * *
>
> First, I would like to ask if the U.S. Government is the plaintiff in a civil rights case against an individual or corporation, can that individual or corporation as the prevailing party be awarded attorney's fees against the U.S. Government?
>
> * * * *
>
> Mr. RAILSBACK. * * * [A]s I read the bill before us, my answer would be yes. What we do is limit the United States from recovering *but we do not limit the rights of other prevailing parties to recover in the event the United States would be the plaintiff in an action such as described in the bill.*

122 CONG. REC. H 12163 (daily ed. Oct. 1, 1976) (emphasis added). Mr. Railsback further explained:

> [A]s I read the bill before us, we limit the right of the U.S. Government to recover, *we do not limit in a case where the United States would be the plaintiff suing a defendant, we do not limit the defendant's right to recover.* Where the judge might decide that a prevailing defendant should recover, *we do not limit the defendant from recovering from the United States in civil rights cases.*

Id. at 12163-12164 (emphasis added).[21] Another colloquy between Congressman Railsback and Congressman Quie is also quite plain in its implications.

> Mr. QUIE. * * * [I]f the United States is the plaintiff and loses a civil rights case against a school district or college, can that school district or college as the prevailing party be awarded attorneys fees against the U.S. Government?
>
> Mr. RAILSBACK. * * * [A]gain it would be in the discretion of the court and *nowhere in the bill do we prevent a school district or college from recovering reasonable attorneys fees, even in a case where the United States is a party plaintiff.*

Id. at 12164 (emphasis added). This is the type of "precise analyses of statutory phrases by the sponsors of proposed laws" which courts give significant weight.

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[21] The Government attempts to explain Congressman Railsback's statement as due to confusion caused by the Houses's "eleventh hour" consideration of the bill. In addition, it suggests that this statement was immediately refuted by Congressman Drinan, the bill's sponsor, when the latter remarked:

> [It] is very clearly limited. If a Federal judge came to that conclusion it would indeed be a most unusual case. This provision was inserted into the Senate bill. It did not originate with the House Judiciary Committee. It does give a remedy for the most extraordinary case where the defense could assert and prove to a Federal judge that an IRS case brought against him was so vexatious and so without merit that he should get compensation.

Id. at 12164. However, it seems that if there was any confusion it was on the part of Congressman Drinan. He apparently thought that Congressman Railsback was referring to the amendment to the bill, adopted in the Senate, which made the United States liable to prevailing defendants in certain tax cases. *See* note 10 *supra*. Congressman Railsback was not in fact referring to this provision. When Congressman Railsback reiterated his understanding that the bill authorized awards against the United States, his statement was not challenged by Congressman Rodino who shared the view that the Act allowed awards against the federal government. *See* text at notes 17-18 *supra*.

S&E Contractors, Inc. v. *United States, supra*, 406 U.S. at 13 n.9. I am at a loss to understand how the majority can maintain, in the face of evidence of this sort, that the legislative history of the Act does not clearly show that Congress intended Section 1988 to apply to the United States.[22]

V

Only "prevailing parties" may be awarded attorneys' fees under Section 1988. The Government concedes that appellees in *Andrulis* v. *United States*, No. 78-2039, are

[22] The Government relies on, and the majority cites with approval, court decisions that have held that § 1988 does not apply to the United States, *Shannon* v. *HUD*, 433 F.Supp. 249 (E.D. Pa. 1977), *aff'd per curiam*, 577 F.2d 854 (3d Cir.), *cert. denied*, —— U.S. ——, 47 U.S. L. WEEK 3391 (Dec. 4, 1978); *Southeast Legal Defense Group* [*SLDG*] v. *Adams*, 436 F.Supp. 891 (D. Ore. 1977). The District Courts that decided the *Shannon* and *SLDG* cases did not have the benefit of the Supreme Court's comment in *Hutton* v. *Finney*, 437 U.S. 678 (1978), about the broad reach of § 1988. The Third Circuit in its brief *per curiam* did not address this point. Moreover, these courts appear to have been under the mistaken impression that the only attorneys' fees provisions that have been applied to the United States are those that specifically mention the United States by name. But as the majority of this court points out, an intention to authorize such awards may be inferred by "necessary implication" from the context in which a fee provision is found. *See* text at notes 11-14 *supra*; majority opinion at 6. Finally, the *SLDG* court misconstrued § 1988's legislative history (the Third Circuit's *per curiam* opinion in *Shannon* cited *SLDG* with approval, 577 F.2d at 856). The *SLDG* court noted that the Senate rejected an amendment offered by Senator Helms which would have made the United States liable for attorneys' fees to prevailing parties in every civil case and to acquitted criminal defendants. It concluded from this that Congress declined the opportunity to authorize fee awards in civil rights cases under § 1988. 436 F.Supp. at 893. This conclusion is erroneous. Senator Helms was an opponent of the bill and his aim in offering the amendment was to lessen the bill's chances for enactment by broadening the Government's scope of liability. The Administration for one was opposed to such broad liability. *See* House Hearings, *supra* note 16, at 177-182 (testimony of Mr. Lee). The fact that Congress declined to enact such a broad attorneys' fees provision can in no way be interpreted as a rejection of the Government's liability under the more limited legislation being considered.

prevailing parties. But it challenges the District Court's ruling that appellees in *NAACP* v. *Civiletti*, No. 78-1639, are prevailing parties. The majority does not reach this issue since it finds that Section 1988 does not apply to the federal government. Because I find Section 1988 applicable to the United States, I will briefly examine the Government's claim.

The case arose out of the fatal shooting of Carnell Russ, a black man, by a white Arkansas law enforcement officer while Russ was detained for an alleged traffic violation. The officer was tried for manslaughter and acquitted by a state court jury. The Justice Department reviewed the transcript of the trial and FBI reports and decided against prosecuting the officer under the federal criminal civil rights statute, 18 U.S.C. § 242 (1976).

Subsequently, the Russ family and the NAACP brought suit under the Civil Rights Act, 42 U.S.C. §§ 1981 and 1985 (1976), challenging the adequacy of the federal investigation and the decision not to prosecute. The nub of their claim was that the Justice Department illegally deferred to the state proceedings pursuant to a policy, established in 1959 by then Attorney General Rogers, of not initiating a federal prosecution after a state prosecution for the same act, unless there were compelling reasons. Plaintiffs sought both damages and injunctive relief.[23]

While this suit was pending, then Attorney General Bell issued in February 1977 a memorandum modifying

[23] The District Court characterized the primary objective of plaintiffs' claim as "ensur[ing] that the * * * Department of Justice [does] not fail to vindicate federally protected interests by not prosecuting local law enforcement officers alleged to have violated federal criminal civil rights statutes simply because state or local authorities had already prosecuted those officers for state or local offenses arising from the same conduct." Joint Appendix (JA) 279.

the 1959 policy against dual prosecutions. He announced a new policy of evaluating "each and every allegation of a violation of the civil rights laws * * * on its own merits," without regard to related state enforcement action. Joint Appendix (JA) 277. Both parties agreed that the Bell memorandum effectively mooted the lawsuit, and they filed a joint motion to dismiss. In granting the motion the District Court agreed with the parties that the Bell memorandum was in accord "with the policy objectives which underlie this lawsuit * * *." JA 279, 282-283. Plaintiffs subsequently filed a motion for and were awarded attorneys' fees under 42 U.S.C. § 1988 (1976).

The award of attorneys' fees under Section 1988 is left to the discretion of the court. As such the District Court's judgment should be reversed only for an abuse of discretion. *Morrow* v. *Dillard*, 580 F.2d 1284, 1300 (5th Cir. 1978); *Sandford* v. *R. L. Coleman Realty Co.*, 573 F.2d 173, 179 (4th Cir. 1978). The District Court properly identified the test for a prevailing party as "whether that party has accomplished the objectives of his litigation. *Parker* v. *Matthews*, 411 F. Supp. 1059, 1064 (D.D.C. 1976), *aff'd sub nom Parker* v. *Califano*, 561 F.2d 320 (D.C. Cir. 1977)." JA 283.[24] The District Court found that the plaintiffs' "persistent prosecution of this action was a strong catalytic factor in the issuance of the Bell memorandum." JA 284. It also found that the plaintiffs had achieved the policy objective set out in their second amended complaint—publicizing and correcting the Justice Department's policy of deferring to prior state civil rights prosecutions. *Id.*

[24] It is plain from the legislative history of § 1988 that a litigant may be a prevailing party even though the lawsuit was not prosecuted to a full trial on the merits. *See* S. Rep. No. 94-1011, *supra* note 7, at 5; H.R. Rep. No. 94-1558, *supra* note 7, at 7.

To be sure, fathoming the Attorney General's motives is not the easiest of tasks. Nevertheless, I conclude, after a careful review of the record, that the District Court did not abuse its discretion in awarding attorneys' fees to appellees as "prevailing parties."

VI

The attorneys' fees provisions of the civil rights statutes were enacted "to encourage individuals injured by racial discrimination to seek judicial relief * * *." *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). Courts construing these attorneys' fees provisions must strive to further this goal. The decision by the majority of this court will defeat Congress' purpose in enacting Section 1988 insofar as suits against the federal government are concerned. An examination of the purposes, language, and legislative history of Section 1988 provides ample support for the conclusion that Congress intended to authorize attorneys' fees awards against the United States under the Act.

I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1978

D.C. Civil Action No. 75-1317

[Filed Sep. 26, 1979]

No. 78-1639

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*

v.

BENJAMIN R. CIVILETTI, in his Official Capacity as the Attorney General of the United States, *et al.*,
Appellants

D.C. Civil Action No. 77-1936

No. 78-2039

MARILYN W. ANDRULIS, *et al.*

v.

UNITED STATES OF AMERICA, *et al.*,
Appellants

Before: WRIGHT, Chief Judge, WILKEY, Circuit Judge, and LARSON, Senior District Judge *

---

* For the District of Minnesota, sitting by designation pursuant to 28 U.S.C. § 292(d).

ORDER

It is ORDERED, by the Court, *sua sponte*, that the Opinion for the court filed in the above captioned cases on September 26, 1979 be; and it hereby is, amended as follows:

On page 2, line 5, delete the word "General".

On page 3, 3rd full paragraph, line 1 change "*NAACP* v. *Bell*" to read "*NAACP* v. *Civiletti*".

Per Curiam

For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-1936

[Filed Jun. 12, 1978]

MARILYN W. ANDRULIS, and
ANDRULIS RESEARCH CORPORATION,
Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

MEMORANDUM

Having considered plaintiffs' request for attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. § 1988 (West Supp. Pamph. 1977), defendants' opposition thereto, and the entire record in the case, the Court is of the opinion that the award request should be granted. The parties' final settlement in favor of plaintiffs qualifies plaintiffs, who earlier had successfully sought preliminary relief, as "prevailing" parties within the meaning of the statute. H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 7 (1976); *see Nationwide Building Maintenance, Inc.*, v. *Sampson*, 559 F.2d 704, 708-09 (D.C. Cir. 1977). Plaintiffs' claim of race and sex discrimination is cognizable under 42 U.S.C. §§ 1981, 1985(3), 2000d (1970), and thus qualifies as a "fee claim" under the Act. Although there is no evidence that plaintiffs prevailed at any stage on the discrimination aspect of their lawsuit, they are nonetheless eligible for an award if the discrimination claim meets the "substantiality" test enunciated in *Hagans* v. *Lavine*, 415 U.S. 528 (1974), and shares with the non-fee claims a "common nucleus of operative fact," as defined in

United Mine Workers v. *Gibbs*, 383 U.S. 715 (1966). H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 4 n.7 (1976). Plaintiffs' briefs, affidavits, and oral representations made in support of the temporary restraining order all indicate that these criteria are met. Therefore, plaintiffs are eligible, subject to the Court's discretion, to an award of attorney's fees for all work done in the case, including prosecution of the unsuccessful administrative appeal. *Cf. Parker* v. *Califano*, 561 F.2d 320 (D.C. Cir. 1977) (construing nearly identical language in 42 U.S.C. § 2000e-5(k) (1970) to include fees to prevailing party in Title VII suit for unsuccessful administrative proceedings).

The attorneys representing plaintiffs in the proceedings before this Court were experienced. Their work was of high quality, and they made efficient use of their time. Their hourly charges are reasonable and wholly consistent with prevailing rates and billing practices in this community. Considering these factors, the nature of the case, and all data submitted by affidavit, the Court finds that a reasonable fee should be awarded in the following amounts:

Shea and Gardner:	
Professional Services	$ 17,239.00
Out-of-pocket expenses	1,135.03
	$ 18,374.03
Edward J. Smith, Jr.:	
Professional Services	$ 1,500.00
Total:	$ 19,874.03

The Clerk of Court is directed to enter judgment accordingly.

SO ORDERED.

/s/ Gerhard A. Gesell
United States District Judge

June 12, 1978.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-1936

MARILYN W. ANDRULIS, *et al.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

ORDER

Upon consideration of the motion of defendants United States Small Business Administration and A. Vernon Weaver, in his official capacity, for reconsideration, or in the alternative, for clarification of the Court's Memorandum Opinion of June 12, 1978, plaintiffs' opposition thereto, and the entire record herein, it is by the Court this 13th day of July, 1978,

ORDERED that none of the individual defendants are liable for any portion of the fees awarded in the June 13, 1978, Judgment since the action against them was dismissed, with prejudice, by Order of March 8, 1978, and it is further

ORDERED that the fee is payable to plaintiffs jointly, and it is further

ORDERED that defendants' motion for reconsideration be, and hereby is, denied, and defendants' motion for clarification is granted to the extent indicated above.

/s/ Gerhard A. Gesell
United States District Judge

July 13, 1978.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

D.C. Civil No. 75-1317

[Filed Oct. 19, 1979]

No. 78-1639

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*

v.

BENJAMIN R. CIVILETTI, in his Official Capacity as the Attorney General of the United States, *et al.*,
Appellants

D.C. Civil No. 77-1936

No. 78-2039

MARILYN W. ANDRULIS, *et al.*

v.

UNITED STATES OF AMERICA, *et al.*,
Appellants

Appeals from the United States District Court
for the District of Columbia

Before: WRIGHT, Chief Judge, WILKEY, *Circuit Judge*, and LARSON,* Senior District Judge for the District of Minnesota

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* Sitting by designation pursuant to 28 U.S.C. § 292(d).

JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED, by this Court, that the judgments of the District Court appealed from in these causes, insofar as they deal with the award of attorney's fees, are hereby reversed, in accordance with the opinion of this Court filed herein this date.

Per Curiam

For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: September 26, 1979

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed Jan. 4, 1980]

No. 78-2039

MARILYN W. ANDRULIS, *et al.*

v.

UNITED STATES OF AMERICA, *et al.*,
Appellants

Before: Wright, Chief Judge; Wilkey, Circuit Judge; and Larson *, Senior Judge, United States District Court for the District of Minnesota

ORDER

Upon consideration of appellees' (Andrulis, et al.) petition for rehearing, and of the memorandum in support thereof filed by amicus curiae (Women's Legal Defense Fund, Inc.), it is

ORDERED, by the Court, that appellees' aforesaid petition for rehearing is denied.

Per Curiam

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

Chief Judge Wright would grant appellees' petition for rehearing.

Supreme Court, U.S.
FILED
NOV 30 1980
MICHAEL RODAK, JR., CLERK

No. 79-1542

In the Supreme Court of the United States

OCTOBER TERM, 1979

MARILYN W. ANDRULIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

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No. 79-1542

MARILYN W. ANDRULIS, ET AL., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 609 F. 2d 514. The opinion of the district court (Pet. App. 38a-39a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1979. A timely petition for rehearing was denied on January 4, 1980 (Pet. App. 43a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988, expressly waives sovereign immunity so as to authorize an award of attorney's fees against the United States.

2. Whether a waiver of sovereign immunity sufficient to authorize an award of attorney's fees against the United States is provided by the "sue and be sued" clause of the Small Business Act, 15 U.S.C. 634(b)(1).

STATEMENT

1. Petitioners are Marilyn W. Andrulis, Ph.D., and Andrulis Research Corporation (ARC), a scientific consulting firm in which she holds a 51% interest (J.A. 109).[1] Andrulis, who holds an Associate Professorship in chemistry, founded ARC in 1971 after enjoying a series of high level scientific consulting positions (J.A. 61, 64-65). In 1977 she applied on behalf of ARC to participate in a Small Business Administration (SBA) Section 8(a) program for small firms controlled by persons who are socially and economically disadvantaged. 15 U.S.C. 637(a); 13 C.F.R. 124.8-1(c) (1977). Firms certified for participation under Section 8(a) become eligible for government procurement contracts without the normal prerequisite of competitive bidding. Andrulis based her request for certification on the social and economic difficulties she had encountered entering the mainstream of the procurement process as a female entrepreneur (J.A. 9-11).

Although the SBA officials who initially examined the application indicated that ARC's eligibility "bears scrutiny," the application was approved by the Washington, D.C., District Office in June 1977. Shortly thereafter, the Administrator of SBA was called before a Senate Subcommittee to testify on perceived abuses in this program, and, in response to congressional inquiries, agreed to discontinue new program entries and rescreen

[1]The remaining 49 per cent interest is held by her husband, also a Ph.D (J.A. 109). "J.A." refers to the joint appendix filed in the court of appeals.

existing participants (J.A. 76-77; 91-92; 104). ARC's application was reconsidered in the wake of this activity, and, in September 1977, rejected on the stated basis that plaintiff, a Caucasian, was neither socially disadvantaged nor, given her career background and net worth, economically disadvantaged.

2. In November 1977, petitioners sued to enjoin SBA from disqualifying ARC from the Section 8(a) program, charging SBA with committing procedural violations of the APA, and with discriminating against Andrulis on the basis of sex and race in violation of 42 U.S.C. 1981 and 1985(c) and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d. A temporary restraining order was entered, following a hearing confined to the alleged procedural irregularities in ARC's termination, and shortly thereafter the suit was settled upon SBA's agreement to reinstate ARC in the program.

A consent decree was then entered and petitioners moved in the district court for an award of attorney's fees, relying on the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988 ("the Act"). That statute provides, *inter alia*, that attorney's fees may be awarded in the discretion of the court to parties prevailing in a proceeding to enforce a number of civil rights statutes, three of which had been pled by petitioners. The district court awarded petitioners attorney's fees over the government's objection that 42 U.S.C. 1988 does not contain an express waiver of sovereign immunity necessary to overcome the prohibition against such an award codified in 28 U.S.C. 2412.[2]

[2]28 U.S.C. 2412 proscribes awards of attorney's fees against the federal government "[e]xcept as otherwise specifically provided by statute."

3. On the government's appeal, a divided panel of the court of appeals reversed, concluding that the award was barred by 28 U.S.C. 2412. The majority noted this Court's "well established precedent" that "waiver of federal sovereign immunity 'cannot be implied but must be unequivocally expressed.' *United States* v. *King*, 395 U.S. 1, 4 (1969)," and observed that 28 U.S.C. 2412 "has been consistently construed as immunizing the United States against attorney's fees awards absent clear or express statutory authority to the contrary" (Pet. App. 4a). The majority explained that Congress had nowhere provided in 42 U.S.C. 1988 that the "United States shall be liable for costs the same as a private person," in contrast to its choice of language in the host of other statutes waiving federal immunity against attorney's fees (Pet. App. 5a-6a). The majority rejected petitioners' reliance on the phrase "any action" in the provision in 42 U.S.C. 1988 that awards may be allowed "in any action or proceeding to enforce [specified civil rights statutes]," since that phrase has "repeatedly appeared in attorney's fees provisions, yet when in the past Congress has sought to override 28 U.S.C. §2412 it has apparently considered it necessary to add a phrase explicitly establishing the liability of the United States" (Pet. App. 7a, footnote omitted).[3]

The majority rejected petitioners' contention that the present case is controlled by *Hutto* v. *Finney*, 437 U.S. 678 (1978), in which this Court held that the Act abrogates the States' Eleventh Amendment immunity despite the absence of an express waiver. The majority explained (Pet. App. 9a-12a) that the express bar to fee awards against the United States codified in 28 U.S.C. 2412 is more difficult to overcome than the general immunity of the States under the Eleventh Amendment, and that, in contrast to the legislative history relied upon in *Hutto* to show the intent of Congress to permit fee awards against the States, there was "[n]o such unequivocal indication of congressional intent * * * with respect to the issue of federal immunity." Finally, the majority (Pet. App. 12a n.12) rejected petitioners' alternative argument that the necessary waiver can be found in the "sue and be sued" clause of the Small Business Act, 15 U.S.C. 634(b)(1).

[3]The Act does expressly waive federal immunity in a limited class of Internal Revenue Service cases. See *Aparacor, Inc.* v. *United States*, 571 F. 2d 552 (Ct. Cl. 1978).

Chief Judge Wright, dissenting, adopted petitioners' argument based on the "any action or proceeding" language of 42 U.S.C. 1988, and asserted that congressional intent to waive federal immunity could be inferred from the legislative history of that provision (Pet. App. 14a-15a, 19a-20a). He declined to reach petitioners' "sue and be sued" clause arguments (Pet. App. 14a n.2).

ARGUMENT

The decision below is correct and does not conflict with the decisions of this Court or the courts of appeals. Further review by this Court is unwarranted.

1. Petitioners recognize that 42 U.S.C. 1988 does not contain the language traditionally employed to waive federal sovereign immunity, but argue that the Act should nevertheless be construed as waiving sovereign immunity by necessary implication. This argument is unpersuasive.

As we explained in our brief in opposition to the petition for certiorari in *Shannon* v. *HUD*, 577 F. 2d 854 (3d Cir.), cert. denied, 439 U.S. 1002 (1978),[4] which raised

[4]We rely on the arguments advanced in our brief in opposition to the petition for certiorari in *Shannon* v. *HUD*, No. 78-369, a copy of which is being furnished to counsel for petitioners.

the identical question presented here, 28 U.S.C. 2412 can be overriden only by a statute that unequivocally waives federal sovereign immunity. That waiver is not supplied by the phrase "any action or proceeding," and, as we demonstrated in *Shannon*, the legislative history of the Act does not compel—or even support—the inference that Congress intended to enact such a waiver. Indeed, if any inference may be drawn, it is that Congress intended *not* to subject the federal fisc to such awards under this "narrow" statute, but rather to defer until a later day consideration of more expansive bills[5] "which would go far beyond the 'American Rule' or 'private attorney general' exception to it, and which may allow recovery against the Federal Government" (letter of Mr. Rodino introduced in Senate, 122 Cong. Rec. 32184 (1976)).[6]

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[5]S. 265, which would amend 28 U.S.C. 2412 to authorize attorney's fee awards against the United States whenever a statute provides for such awards against private litigants, was passed by the Senate last year. 125 Cong. Rec. S10924 (daily ed. July 31, 1979). It is pending in the House of Representatives.

[6]Petitioners assert (Pet. 13) that the government was unable to cite "a shred of direct evidence suggesting that Congress intended to except the federal government, as opposed to all other civil rights defendants" from the attorney's fee award provisions. But as we demonstrated in our brief in opposition to the certiorari petition in *Shannon* (pages 5-7), that intent is manifest from the internal structure of the Act, and directly evidenced in numerous portions of the legislative history. The attempts of petitioners and the dissent to undercut this abundance of evidence fails. For example, both the House and Senate Reports accompanying the various attorney's fee bills (written before the amendment to allow for limited awards against the federal government in cases brought under the Internal Revenue laws) stated that the government would incur "no additional cost" as a result of this legislation. S. Rep. No. 94-1011, 94th Cong. 2d Sess. 7 (1976); H.R. Rep. No. 94-1558, 94th Cong. 2d Sess. 9-10 (1976). The dissent attempts to resist the plain import of these statements by theorizing that the payments are "apparently made" from a Justice Department litigation fund that was never increased to account for awards in IRS cases, and by pointing to a remark of

Order on

Nothing has occurred since the Court denied certiorari in *Shannon* to make this question worthy of review. Indeed, consideration by this Court is even less warranted now because the Third Circuit has since been joined in its interpretation of the Act by the District of Columbia Circuit in this case; and, more recently, in *Hampton* v. *Hanrahan*, petition for rehearing Nos. 77-1698, 77-1210, and 77-1370 (7th Cir., Apr. 15, 1980), the Seventh Circuit struck a portion of an earlier order on which petitioners relied (Pet. n.18), which had arguably authorized an award of attorney's fees against the United States in a suit brought against, *inter alia*, federal officers for alleged deprivations of the plaintiffs' civil rights.[7] No court of

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former Assistant Attorney General Rex Lee that fee awards would "reduce already available resources" (Pet. App. 28a). In fact, funds for the IRS awards are drawn from the judgment fund established by 31 U.S.C. 724a (*see* Comp. Gen. Opinion B158810 (Feb. 22, 1977) (unpublished)), which is replenished on a yearly basis by appropriations gauged to take anticipated expenditures into account. And Mr. Lee's remarks—made at the early hearing stage when several very different versions of the legislation were being considered—actually were intended to demonstrate that monies appropriated by Congress to cover fee awards would be diverted from other, perhaps more fruitful purposes. Similarly, the dissent incorrectly relies on remarks made by Rep. Drinan, during the 1975 hearings for the proposition that H.R. 9552 (which became the House version of the bill finally enacted) would override 28 U.S.C. 2412. Rep. Drinan was, in fact, making a blanket statement about three bills, including H.R. 9552, H.R. 8742, H.R. 8743, the last two of which contained additional language specifically waiving federal sovereign immunity. When the final version of the bill—omitting that language—was presented for debate, Rep. Drinan made it clear that such awards would not involve "a single dollar of Federal money." 122 Cong. Rec. 35117 (1976).

[7]The pending petition filed by the federal petitioners in No. 79-914, *Johnson* v. *Hampton*, seeking review of the Seventh Circuit's earlier decision in *Hampton* v. *Hanrahan*, 600 F. 2d 600 (1979), raises an issue respecting 42 U.S.C. 1988 that is entirely distinct from the question presented by petitioners here. There is, accordingly, no reason to hold this case pending the disposition of *Johnson* v. *Hampton*.

appeals has expressed a contrary view. Petitioners (Pet. 15 n.18) and the dissent below (Pet. App. 19a-20a) assert that circumstances have been altered by this Court's decision in *Hutto* v. *Finney*, 437 U.S. 678 (1978). That case was decided before the petition for certiorari was filed in *Shannon*, however, and the government in its brief in opposition to the *Shannon* petition (page 7) rebutted a contention identical to that raised here. The same reasoning was correctly employed by the majority below.

Petitioners also contend (Pet. 10-13) that because Congress intended to encourage private enforcement of the civil rights laws through its amendment of 42 U.S.C. 1988, it must also have intended to waive the sovereign immunity of the United States as to attorney's fee awards. This contention is without merit. The central congressional aim was to fill the gap created by the ruling in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), that private parties cannot qualify for fee awards under the "private attorney general" exception to the so-called American Rule previously adopted by several lower courts. S. Rep. No. 94-1011, 94th Cong. 2d Sess. 1, 4 (1976); H.R. Rep. No. 94-1558, 94th Cong. 2d Sess. 2 (1976). *Alyeska* created no gap with respect to federal immunity, for the lower courts had uniformly recognized that fees could not be awarded against the United States absent a statutory waiver of 28 U.S.C. 2412. Thus, filling the "gap" did not necessarily entail waiving the immunity of the United States. Moreover, when it enacted the Act in 1976, Congress would have had little reason to believe that a refusal to waive federal immunity would have an appreciable effect on the enforcement of the specified civil rights statutes; for as the panel majority below recognized (Pet. App. 8a, 8a-9a n.9), actions under the Reconstruction Era Civil Rights Statutes are usually brought against individuals or state or local governments,

not the federal government or its officers; and federal aid recipients rather than the United States were the most obvious possible defendants in suits under the remaining civil rights statutes covered by the Act. See *Cannon* v. *University of Chicago*, 441 U.S. 677, 715-716 n.51 (1979).

2. Petitioners also assert (Pet. 15-17) that the requisite waiver of federal immunity in this particular case can be found in the "sue or be sued" clause of the Small Business Act, 15 U.S.C. 634(b)(1). The court below properly rejected this contention[*] and there is no contrary appellate authority. Review by this Court is accordingly unwarranted.

First, 15 U.S.C. 634(b)(1) permits suits against the Administrator of the SBA but expressly precludes injunctive relief. The present suit is an action (based on different statutes) for an injunction directing ARC's reinstatement to the assistance program. It is frivolous to suggest that Section 634(b)(1) waives a statutory immunity against the award of attorney's fees (28 U.S.C. 2414) in connection with suits to which Section 634(b)(1) has no application.

Second, even were suits for injunctive relief allowed under 15 U.S.C. 634(b)(1), petitioners' reliance upon that section would be unavailing, because the waiver of immunity to suit that it embodies does not contain the precise language permitting attorney's fee awards against the United States that is required to overcome the specific language of 28 U.S.C. 2412. See *Alyeska Pipeline Service Co.* v. *Wilderness Society*, *supra*, 421 U.S. at 267-268. Nor is petitioners' argument advanced by their reliance (Pet. 16) on *RFC* v. *Menihan Corp.*, 312 U.S. 81, 85-86

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[*]The dissent (Pet. App. 14a n.2) expressly declined to reach this question.

(1941), for the proposition that "sue and be sued" agencies are not immune with respect to the "usual incidents of suits in relation to the payment of costs and allowances." The award of attorney's fees is by no means a "usual incident" of suits, and Congress clearly would not have contemplated such payments as coming within the limited waiver it enacted in 15 U.S.C. 634(b)(1).[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1980

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[9]Although this precise argument was apparently not made in either case, it is nonetheless noteworthy that courts have found "sue or be sued" agencies immune from attorney's fee awards in *Shannon* v. *HUD*, *supra* (see 12 U.S.C. 1702, permitting the Secretary of HUD to sue or be sued); and *Cassata* v. *Federal Savings and Loan Insurance Corp.*, 445 F. 2d 122 (7th Cir. 1971) (see 12 U.S.C. 1725(c)(4)).

Supreme Court, U. S.
FILED
JUN 9 1980
MICHAEL RODAK, JR. CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1542

MARILYN W. ANDRULIS

and

ANDRULIS RESEARCH CORPORATION,
Petitioners,

v.

UNITED STATES *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS

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Dated: June 9, 1980

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REPLY BRIEF FOR PETITIONERS

I. PLAIN MEANING OF § 1988

The Government in its brief in opposition (at 5) misconstrues the position of the petitioners, as well as that of the dissent below, by claiming that we rely upon "necessary implication" to find that the United States is an eligible fee-paying party under § 1988. While even the majority below acknowledged that "statutory autorization may be inferred by *necessary implication* from the statutory context in which a fee provision arises" (App. 5a (emphasis added)), it is petitioners' essential contention here that § 1988's requirement that fees be awarded to the prevailing party in "any action" "could not be broader," *Hutto* v. *Finney*, 437 U.S. 678, 694 (1978),

and thus, § 1988, *a fortiori*, directly and plainly covers those actions in which the United States is a party.

Petitioners' position is supported by the fact that both the First and D.C. Circuits have found that the term "any party" in the Clean Air Act attorney's fee provision, 42 U.S.C. § 7604(d), expressly covers the United States [1]; that the Rehabilitation Act's attorney's fee provision (§ 505(b)), modeled by Congress after § 1988, has been explicitly declared by Congress to cover the United States [2]; and that the leading scholarly commentary on this question fully endorses the position of the dissent below. Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act*, 80 Colum. L. Rev. 346, 363-65 (1980).[3]

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[1] *NRDC* v. *EPA*, 512 F.2d 1351, 1353-54 (D.C. Cir. 1975) (*dictum*); *NRDC* v. *EPA*, 484 F.2d 1331, 1336, n.5 (1st Cir. 1973). See also *Sierra Club* v. *EPA*, D.C. Cir. No. 76-1073 (April 27, 1979) (Federal government did not contest award when statute merely provided "in any judicial proceeding").

[2] The dissent stated in this regard:

> "* * * Equally instructive is the fact that Congress only recently enacted Section 505(b) of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 92 Stat. 2983, an attorneys' fees provision which, in the words of its sponsor, 'parallels the Civil Rights Attorneys' Fees Awards Act of 1976 . . . .' 124 Cong. Rec. S. 15590 (daily ed. Sept. 20, 1978) (remarks of Sen. Cranston). The language of Section 505(b) is virtually the same as that of Section 1988. Section 505(b)'s sponsor and the accompanying Committee Reports made it clear that this attorneys' Fee provision is to be used to vindicate rights against the federal government." (App. 21a) (Footnotes omitted).

[3] In an effort to deflect attention from the critical importance of this *civil rights* issue, the Government (at 6, n.5) has attempted to assure this Court that the question will be resolved by *general* attorney's fee legislation. In so doing, it points to legislation, pending since the passage of § 1988 in 1976, which affords a trial judge discretion to award fees in *any* civil case (other than a tort action) which is lost by the United States. 125 Cong. Rec. S. 10925 (daily ed., July 31, 1979). While this legislation did pass the Senate almost a year ago, it is now considered highly controversial because of a fear that it will "chill", *inter alia*, United States enforcement actions. Because of the breadth of the pending legislation, its passage by the House is doubtful.

Moreover, the attorney's fee provision within the Copyright Act, 17 U.S.C. § 505 (1976), is also relevant here. That section provides that "[t]he court in its discretion may allow the recovery of full costs by or against *any party other than the United States or an officer thereof.* The court may also award a reasonable attorney's fee to the prevailing party as part of the costs." (Emphasis supplied.) As the House Report on this provision underscores, the significance of this language is that it "*makes clear that neither costs nor attorney's fees* can be awarded to or against 'the United States or any officer thereof.'" [1976] U.S. Code Cong. &. Ad. News 5659, 5779. (Emphasis supplied.) Were the majority's holding below correct, such language would be unnecessary because the reference to "any party" would not by itself even raise the possibility of recovering fees from the United States; moreover, Congress' evident concern with possible liability on the part of the federal government would make no sense.[4]

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[4] Indeed, it is the Government and the majority below who rely upon "necessary implication" to find that the United States is not covered under the civil rights aspects of § 1988. Section 1988, as a result of a Senate floor amendment, also provides that in situations where the United States unsuccessfully sues a private citizen in a tax case, the United States will pay fees. The United States was mentioned in this context because it was *only* when the United States was an un-

II. UNITED STATES LIABILITY UNDER § 1988 STATUTES

The United States, finding no clear rationale in the statute or the legislative history to support the underlying inequity of its position (*i.e.*, that it alone among civil rights violators need not pay attorney's fees to prevailing plaintiffs), further contends (at 8-9) that the civil rights statutes referenced within § 1988 barely apply to the federal government. We have, however, cited in our petition (at 10-11, n.13) a large number of cases in which the United States or its officials have been held liable under four of the six civil rights statutes included within § 1988. Moreover, the Assistant Attorney General for the Civil Division, when testifying upon § 1988, expressly acknowledged that the civil rights statutes referenced therein apply to the United States.[5]

The Committee Reports accompanying § 1988 also cite cases brought against Cabinet officers under Title VI of

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successful plaintiff that fees would be assessed. Fees were not to be assessed in "any" IRS action. See, *e.g.*, *Key Buick Co.* v. *Commissioner*, No. 2781 (5th Cir., March 19, 1980) ("For an award of attorney's fees to be appropriate [in taxpayer litigation], the government must be the initiating or moving party.") But, the Government and majority contend that, because the United States was mentioned in this limited IRS context, it must be that the failure to specify that civil rights actions against the United States would be included within "any [civil rights] action," therefore means that the United States is exempt from liability in the civil rights context. For a fuller treatment of the Government's contention in this regard, *see* the dissent at App. 19a-20a, n.10.

[5] "Awarding of Attorney's Fees," *Hearing before the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice*, 94th Cong., 1st Sess. (Ser. No. 64) at 176-77 (Assistant Attorney General Lee stated: "Actions under the statutes involved have been brought against both Federal officers and private individuals.")

the Civil Rights Act of 1964, 42 U.S.C. § 2000d—one of the statutes covered by § 1988.[6] Indeed, one week before petitioners filed for attorney's fees in this action, the United States entered into a consent decree in litigation brought against it under Title VI and Title IX of the Education Act Amendments of 1972 (20 U.S.C. § 1681) (also covered by § 1988) and agreed therein to the award of attorney's fees to plaintiffs pursuant to, *inter alia*, § 1988.[7] Finally, in this very case, the United States consented to a settlement pursuant to civil rights claims covered by § 1988, and this Court's recent decision in *Hanrahan* v. *Hampton*, No. 79-912 & 79-914 (June 2, 1980), also makes it clear that a civil rights action covered by § 1988 could properly proceed against United States' officials.

In short, the Government's contention that it is reasonable for it alone to be exempt from § 1988's sweep on the ground that the § 1988 statutes have little or no applicability to the United States is wholly unsupportable.

III. CURRENT CONFLICT

The Government's effort (at 7) to dismiss the fact that there is presently a conflict among the Circuits on the § 1988 issue is equally unpersuasive. At the time the instant petition was filed, the Seventh Circuit had awarded fees against the United States, *inter alia*, under § 1988 in *Hampton* v. *Hanrahan*, No. 77-1698 (December 15, 1979) at 13. It did so (despite the fact that the federal defendants there were only sued in their personal

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[6] See, *e.g.*, H. Rep. No. 94-1558, 94th Cong., 2d Sess. at 5, 7 (1976) (*citing Hills* v. *Gautreaux*, 425 U.S. 284 (1976), and *Adams* v. *Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (*en banc*)).

[7] See, *e.g.*, *Adams* v. *Califano*, C.A. No. 3095-70 (D.D.C., May 3 and 5, 1978); *WEAL* v. *Califano*, C.A. No. 74-1720 (D.D.C., May 3, 1978).

capacities) by relying upon that portion of *Hutto* v. *Finney*, 437 U.S. 678, 693, 700 (1978), which held that fees may not be awarded under § 1988 against governmental defendants in their personal capacity unless there is a showing of bad faith. Since bad faith had not been shown in *Hampton* on the part of any state or federal official, the Seventh Circuit awarded the fees against all of the governmental instrumentalities represented by the defendants there, including the United States.

On February 7, 1980, the United States petitioned for rehearing claiming that § 2412 barred an award against the United States and urged (at page 15 of the petition) that the Seventh Circuit "should clarify . . . its order to show that only the state and not the federal government can be liable for fees under 42 U.S.C. § 1988." The Seventh Circuit, however, in an April 15, 1980, order attached as an Appendix hereto merely struck a portion of a paragraph from its opinion explaining why it awarded the fees against the governmental bodies, and stood by its ruling "that one-third of the fees award should be paid by the federal defendants . . . ." Since, as the Seventh Circuit acknowledged, *Hutto* does not permit fees in this context to be paid by governmental officials sued as individuals, the import of the judgment was that the United States had to pay its share of the fees in question. Such a judgment is consistent with that portion of the Senate Report accompanying § 1988 which provided that when a governmental official is sued and no bad faith is shown fees "will be collected from the official, in his official capacity, from funds of his agency or under his control, or from the . . . government (whether or not the agency or government is a named party)." S. Rep. No. 94-101, 94th Cong., 2d Sess. at 5 (footnote omitted).

While it is true that this Court recently reversed the Seventh Circuit fee award on other grounds (*i.e.*, it was premature), *Hanrahan* v. *Hampton*, Nos. 79-912 & 79-914 (June 2, 1980), the Seventh Circuit's position that fees could be awarded against the United States was clearly unaffected by that decision, and a conflict thus persists.

When this conflict is added (a) to the obvious confusion over this question—as evidenced by the United States' conceding the issue at the trial level in the companion case below [8] and in other litigation (see text accompanying n.7, *supra*)—and (b) to the question's direct impact upon the construction of other fee statutes which do not expressly mention the United States by name (such as the Clean Air (42 U.S.C. § 7604(d)) and Water (33 U.S.C. § 1365(d)) Acts and the Rehabilitation Act (see n.2, *supra*)), it is clear that this important matter is ripe for dispositive treatment by this Court.[9]

IV. SECTION 634(b)

Petitioners also have asked this Court to examine the question of whether the "sue and be sued" clause within § 634(b) of the Small Business Act would permit a § 1988 award against the Small Business Administra-

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[8] *NAACP* v. *Civiletti*, No. 79-1543 (*petition for certiorari pending*).

[9] The Government also places great reliance (at 5-7) upon the fact that this Court has already once before denied certiorari in a case raising the issue presented here. *Shannon* v. *HUD*, 577 F.2d 854 (3d Cir.), *cert. denied*, 439 U.S. 1002 (1978). The Third Circuit, however, did not have the benefit either of this Court's decision in *Hutto* v. *Finney*, *supra*, or, as evidenced by the fact that *Shannon* was a two-page *per curiam* opinion, many of the arguments advanced by petitioners below and fully considered by the split panel of the District of Columbia Circuit. We respectfully suggest this case and its companion provide the Court with a much fuller record to resolve the issue than that found in *Shannon*.

tion ("SBA"), even if § 1988 by itself did not provide a general waiver against the United States. The Government responds (at 9-10) that the question is meritless because § 634(b) does not provide for attorney's fees. However, we rely upon § 634(b) solely as an "express statutory consent" [10] to suit which places the SBA "upon an equal footing with private parties" [11] for purposes of the incidents of litigation. If SBA is on such an equal footing, it must, as is true of every other private party, pay fees to a prevailing civil rights plaintiff under § 1988. Hence, §§ 634(b) and 1988 read together satisfy the need for a statutory waiver for attorney's fees found in 28 U.S.C. § 2412.

The Government also argues (at 9) that, since petitioners' suit was one for injunction and since § 634(b) bars injunctive relief against the SBA, our contention that fees should be awarded pursuant to § 634(b) is "frivolous." As the Government knows full well, however, it has been widely held that when the SBA "Administrator acts beyond the scope of his authority 15 U.S.C. § 634(b) does not preclude injunctive relief." *Dubrow* v. *SBA*, 345 F.Supp. 4, 7 (C.D. Calif. 1972). It was on this basis that the district court below, over the Government's objection, entered a temporary restraining order against that agency. Transcript of Proceedings, November 11, 1977.[12] In any event, the complaint in this action was for damages as well as injunctive relief, and we no longer seek to use § 634(b) for injunctive relief, but solely to obtain fees. The payment of attorney's fees by SBA is not a form of relief barred by § 634(b).

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[10] *Mar* v. *Kleppe*, 526 F.2d 867, 870 (10th Cir. 1975).

[11] *RFC* v. *Menihan Corp.*, 312 U.S. 81, 85-86 (1941).

[12] Indeed, if § 634(b) were a bar to relief, the United States could have presented it as a defense below rather than settling the litigation by permanently placing petitioners in the § 8(a) program.

V. UNDERLYING FACTS

The questions presented in the petition are strictly legal in nature and do not rest upon the underlying facts. However, the Government, in an obvious effort to cast a cloud over the petition, has suggested (at 2-3) by innuendo that petitioners never properly belonged in the § 8(a) program. It is difficult in a reply brief to fully address these assertions which are either misstatements of fact [13] or a gross distortion of the record.[14] Suffice it to say, that the Government, two days prior to having to answer detailed discovery requests about the way in which the § 8(a) program was operated, settled the underlying case by acknowledging in a consent order that the decision to admit petitioners to the § 8(a) program, which was reviewed at seven different SBA levels (J.A. 74-75), consisted of

> "proper and correct findings and conclusions which support [petitioners'] reinstatement to the § 8(a)

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[13] For example, the Government states (at 2) that Dr. Marilyn Andrulis "holds an Associate Professorship in Chemistry . . . ." Dr. Andrulis does not now hold, nor has she ever held, such a position, and there is nothing in the record of this case which so states.

[14] The record of this case includes findings of the National Research Council, the National Academy of Science, and the United States Civil Rights Commission showing that women scientists are heavily discriminated against in employment and in the federal contracting process. J.A. 65-66. Dr. Andrulis showed, when applying to the § 8(a) program, that she in fact experienced both kinds of discrimination. She especially showed that she faced that discrimination in her prior employment before she founded her own company. J.A. 64-65. The Government then could not have stated the opposite of the truth with greater precision when it claimed (at 2) that Dr. Andrulis founded ARC "after *enjoying* a series of *high level* positions . . . ." (Emphasis added.)

> program and which support a further finding that the problems experienced by [petitioners] in obtaining government contracts are not common in kind or degree to those of other small businesses." J.A. 106-07.

While the Government did originally contest the question whether petitioners had "prevailed" on their civil rights claims for purposes of § 1988, the Justice Department ultimately informed the court of appeals shortly before oral argument that it no longer wished to press that issue. App. 32a-33a.

It should also be noted that in Senate hearings a high level SBA official testified:

> "[I]f the Andulis [sic] case is typical of the treatment given women-owned business entrepreneurs by procurement officials, the documentation of such will meet the eligibility test for being socially disadvantaged and qualified to receive 8(a) contracts under the existing administrative authority." J.A. 76.

The SBA decision to terminate petitioners from the § 8(a) program was expressly criticized by the House during investigations of that program (J.A. 83) as well as by the United States Civil Rights Commission (J.A. 87). Indeed, the SBA Administrator acknowledged during a Congressional investigation that petitioners were fully eligible for the program. J.A. 83. Moreover, the ownership makeup and net worth of the owners of the company placed petitioners well within the mainstream of the 1485 participants within the § 8(a) program. J.A. 80-81. Indeed, their net worth at the time of their admission was within the lower quartile of all program participants. J.A. 80.

To the extent, however, that this Court is concerned about the factual underpinnings of this case, the undisputed affidavit of Dr. Marilyn W. Andrulis is included within the Joint Appendix (at 60-89) filed with the court of appeals, and that Joint Appendix has been lodged by petitioners with the Clerk of this Court.

CONCLUSION

For the reasons stated here and in the petition, the writ should be granted.

Respectfully submitted,

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Dated: June 9, 1980

Appendix

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

April 15, 1980

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*

Nos. 77-1698, *et al.*

IBERIA HAMPTON, *et al.*,
Plaintiffs-Appellants,

vs.

EDWARD HANRAHAN, *et al.*,
Defendants-Appellees.

On Petitions for Rehearing

ORDER

On consideration of the motions filed by the state and federal defendants, respectively, for rehearing and suggestions for rehearing *en banc* of the order with respect to the award of attorney fees issued on December 12, 1979,

IT IS ORDERED that the penultimate paragraph on page 13 of that order be amended to read as follows:

> Plaintiffs' attorneys fail to suggest how the fees should be apportioned between defendants. We hold that one-third of the award should be paid by the

federal defendants and two-thirds should be paid by the state defendants.

The remaining portion of that paragraph is deleted.

IT IS FURTHER ORDERED that the state defendants-appellees' petition for rehearing and suggestion for rehearing *en banc* concerning attorney fees is hereby DENIED.

IT IS FURTHER ORDERED that the federal defendants-appellees' petition for rehearing and suggestion for rehearing *en banc* is hereby DENIED.

IT IS FURTHER ORDERED that the motion filed by the United States to intervene is hereby DENIED.

PELL, *Circuit Judge*, concurring.

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